Contract Law in Hong Kong

An Introductory Guide

Second Edition

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HKU PRESS
香港大學出版社

Hong Kong University Press
The University of Hong Kong
Pokfulam Road
Hong Kong
www.hkupress.org

ISBN 978-988-8208-43-2 (*Hardback*)
ISBN 978-988-8208-63-0 (*Paperback*)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

10 9 8 7 6 5 4 3 2 1

Printed and bound by Hang Tai Printing Co., Ltd. in Hong Kong, China

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Preface to the Second Edition

Due to continuing popular demand, each book in this series of titles has been published again as a second edition while keeping the intention of the original book: to provide an introductory overview of the field of contract law to the general public.

As with the previous edition, the intention for this new edition is to have the main text provide a simplified and easy-to-understand introduction to contract legal principles. For those who are interested, more detailed explanations are found in the notes section, along with references to sources where more substantive information may be found. Also in the notes section are citations to relevant court cases and, where warranted, a discussion of the applicable cases.

This new edition has been updated to reflect the current state of the law in the territory and to include newer cases, both local and overseas. The organisation of this title has been revised for easier comprehension while keeping to the sequence in which a legally binding agreement is usually encountered: creation of the contract, interpreting the terms of the agreement, determining the related issue of whether there are any defects in the agreement, carrying out the terms of the contract, and the possible results if the agreement is not fulfilled. Additionally, further efforts have been made to use simple English in this edition.

It is hoped that these changes will make this edition even easier to use and to understand.

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Introduction

A. Overview

This book is about the general legal principles concerning contracts. Rather than being a specialised textbook for law students, this book aims to introduce contract law to readers from different fields such as construction, accountancy, social work, and other individuals unfamiliar with this area of Hong Kong law. Some examples of topics which will be presented in this book include:

- What is a contract?
- How is a contract made?
- What are the different types of contract?
- When can a party to a contract 'legally escape' from its obligations under that contract?
- What happens when a party cannot 'legally escape' from its obligations under that contract?

Contracts have an important role in our life. Nearly every day, we make contracts with other people and organisations. It is obvious that a contract is formed when the buyer and the seller both sign an agreement, e.g., the sale of a flat. A contract is also formed when we have a meal in a restaurant or buy merchandise from a shop. Since contracts are such an essential part of daily life, it would be useful to have some knowledge of contract law. People could thus become more aware of possible legal issues and reduce the potential for disputes. This book is written with the purpose of increasing the awareness of these legal principles.

This publication will not cover all kinds of contracts. This book will cover contracts that are, in general, governed by the common law. Outside

the scope of this work are the highly specialised contracts or contracts specifically regulated by law. Such types of contract are mainly governed by legislation instead of the common law contract principles on which this book focuses. For example, issues related to contracts of employment are categorised as *employment law*.[1]

However, before continuing on this subject of contract law, we should discuss a related matter. That matter is the common law legal system. Hong Kong, the United Kingdom, along with most of the Commonwealth, and the United States all follow the common law system. Continental Europe and China are examples of countries which follow the civil law legal system. The major difference between the two legal systems is that the common law legal system relies upon precedent.[2] *Common law* simply refers to the law common to everyone. *Precedent* refers to prior examples found in previous court decisions which would be followed in subsequent cases concerning the similar facts and issues. Consequently, this is the reason for referring to cases and for discussing cases in this book.

B. Organisation

This book is divided into seven chapters. We start first with the definition of *contract* which is provided later in this chapter. This is then followed by chapters about the different kinds of contract (i.e., what types or categories of contracts are there), elements of a contract (i.e., what is required to have a contract), and interpretation of a contract. The last three chapters respectively review the different ways to end a contractual relationship (i.e., a contract may end by a vitiating factor being present, completion of what is agreed by the parties in the contract, or one party failing to fulfil its obligations under the agreement so that the other party may sue in court). This book is arranged in a logical sequence of studying how a contract is formed, how its obligations are to be performed, and then how a contract ends.

C. Definition

What is a contract? How does a person know whether the agreement is simply an agreement or is a contract? Simply put, a contract is a legal agreement. A legal agreement refers to:

- an agreement;
- an agreement between at least two parties (a *party* can be, e.g., a person, a government, or a company); and
- one that the parties intend to be enforceable in court.

However, contracts and contract law are not always that simple and easy to understand. For example, there was an argument whether a contract should be defined as an agreement where 'there was an exchange of a promise for another promise', or as an agreement where 'obligations which are enforced or recognised by law'.[3] To complicate matters, there are general rules and exceptions to those general rules. For instance, the definition that a 'contract is an agreement giving rise to obligations which are enforced or recognised by law' is not always applicable.[4] For example, in a unilateral contract, '[person] A promises to do something if [person] B does something else'.[5] This means that when person B 'does something else', it is enough for person A to be bound to the contract. Person A and person B could be strangers and there would obviously be no agreement but a contract would still be formed. In another example, known as a *deed*, if a favour is made to a person, the promises contained in the deed are enforceable by him regardless of whether he is aware of them.[6] It can be seen that a legal contract can be formed without agreement. Conversely, even if there is agreement between two parties, the law does not always enforce the agreement. For example, if the parties are family members or if there are vitiating factors, the contract might not be enforceable.[7]

Nonetheless, in order to determine whether there is an agreement which a court would enforce, there has to be rules or legal principles which will guide the parties or a court in deciding whether there was:

- a legally enforceable agreement;
- what was meant by the agreement;
- how the agreement is to be carried out or enforced;
- what happens when one party fails to perform its obligations (known as a *breach* of contract) under the legally binding agreement; and/or
- how the other party (known as the *injured* party or the *innocent* party) should be compensated for a breach of the contract.

Therefore, we now review the meaning or definition of *contract*. More fully and formally described, a contract is a legally binding agreement between the parties to that agreement.[8] The term *contract* may refer to one or more of the following situations:

- a series of promises or acts that constitute a legally binding agreement
- the legal relationship that results from a series of promises or acts
- the document which represents that series of promises or acts or the performance of that series of promises or acts[9]

Contract law regulates the legality and thus the enforceability of that agreement.[10] The law of contract consists of case law which serves as precedent and which applies generally to all types of contracts. A party'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. Legal enforcement of a contract is done through 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 related to that exchange. One purpose of a contract is to create a structure under which the parties organise their commercial relationship with certainty.[11] As such, an agreement may provide which party will be responsible for any loss of the goods in the transaction.[12] In other words, a contract can also be seen as an allocation of risk between the parties, e.g., the parties may agree that a seller in Hong Kong will accept the risk of damage to a shipment of goods until the goods are delivered to the buyer's warehouse in the United States.

6
Discharge of Contract

Discharge of a contract refers to ending the contractual obligations between the parties. A contract ends when no further rights or obligations remain under the agreement. As stated by one authority:

> The ways in which a contractual promise may be discharged may be classified under two basic headings: discharge in accordance with the contract and discharge 'against' the contract.
>
> The former covers (1) discharge by performance and (2) discharge as a result of an event stipulated in the contract. The latter covers (a) discharge by rescission for such matters as breach or misrepresentation or by subsequent agreement; (b) discharge by frustration; and (c) discharge as a result of certain miscellaneous events such as merger and (in some cases) death or bankruptcy.[1]

We will now review each of these in turn.

A. Performance

A contract ends when the parties have done that which they promised to do under their contract. In other words, the contract is completed as the parties have performed all that they are obligated to do under the agreement. The general rule, though, is that both parties must do precisely what they promised to do before there can be discharge of a contract by performance.[2] There are some exceptions to this general rule and the applicability of these exceptions may depend upon whether the contract is *entire* or *divisible*:

> A contract is said to be "entire" when complete performance by one party is a condition precedent to the liability of the other; in such a

> contract the consideration is usually a lump sum which is payable only upon complete performance by the other party (hence, the reference is sometimes to a "lump sum contract"). The opposite of an "entire contract" is a "divisible contract", which is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance, e.g. an agreement for payment pro rata.[3]

Refer to the scenario in Chapter 4 involving Alice and her purchase of a black Sub-Zero® refrigerator for her new home on the Peak. This scenario can be considered as an example of a lump sum contract involving the sale and delivery of the black Sub-Zero® refrigerator to Alice. Once the ordered item has been safely delivered, the shop has completely performed all its obligations under this contract, i.e., the shop's entire contract with Alice. She is now obligated to pay the full amount, the lump sum. Divisible contracts are discussed in subsection ii below.

i. Substantial Performance

Here, we discuss one exception to the rule that 'a party to a contract must perform exactly what he undertook to do'. This exception is where substantial performance of the contractual obligations has taken place.[4] *Substantial performance* means one party has substantially performed or substantially completed an entire contract but has not completed full performance.[5] In other words, if a party has substantially performed, there is no breach of condition. This doctrine of substantial performance is intended to prevent unfairness where a contract is breached unintentionally and minor non-essential deficiencies are caused, which can be easily and inexpensively remedied. The doctrine is frequently raised in disputes over construction contracts. However, it is not available for wilful or intentional breaches.

Let us return to the example concerning the black Sub-Zero® refrigerator ordered by Alice for her designer kitchen. What are the consequences if the shop delivers a yellow and purple coloured model? What are the consequences if the shop delivers a black Samsung® refrigerator? What are the consequences if the shop delivers a black Sub-Zero® refrigerator that has a scratch on the side which will be hidden once the refrigerator is installed in the cabinetry? What are the consequences if the shop delivers a black Sub-Zero® refrigerator that has a crease on the front? Has the shop made substantial performance or has the shop committed a breach of condition?

If the difference is small between the obligation as performed and the actual contracted obligation, this breach would be considered as a minor

breach of the contract. The party committing this minor breach may be allowed the price agreed under the contract less a deduction for the defective performance. In other words, there will be an allowance for difference between its substantial performance and the original performance under the contract.[6]

Thus, the difference between substantial performance of the contract and complete performance of the contract is considered to be a breach of warranty. Damages for this breach of warranty will be the value of the difference between what was bargained for and what was actually received. Breach with substantial performance results in damages, usually a reduction in price. Breach of a condition results in the innocent party having the option to repudiate the contract and to sue for damages.[7]

ii. Severable Contracts

Another exception to the general rule of performance involves divisible or severable contracts. A *divisible* or *severable* contract is one in which separate 'parts' are to be delivered or performed, and separately paid. Each instalment is considered to be independent of the others, and is separately enforceable regardless of performance or non-performance of the other instalments. The performing party does not have to prove substantial performance of the entire contract to recover for the performance of one instalment.

Should a court consider a contract to be severable, the party who fails to perform all the promises can recover a portion of the contract price for performing part of the contract. Even a wilfully defaulting party is permitted a partial recovery for previously performed instalments of the severable contract. In other words, each instalment is breached one at a time unless the breach of one instalment shows an intention to repudiate the entire contract, or where the breached instalment substantially affects the value of the whole contract. Consequently, even if the performance of the first instalment was defective, the innocent party is not allowed to end the contract as long as the defaulting party has an opportunity to make good the defects in later instalments.

There is a presumption against the existence of a divisible contract. Consequently, a party seeking to separate the individual terms of the contract must prove that both parties intended a severable contract at the time of creating the contract. For example, a party may produce evidence that the parties intended instalment payments be made as work progressed in a building contract, as is the norm.[8]

iii. Part Performance

There is another exception to the general rule that a party must perform fully its contractual undertaking. This exception involves partial performance of the contract. It will be recalled that:

> Where a party has performed only part of an entire obligation it can normally recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of its partial performance, since the court has no power to apportion the consideration. The refusal of pro rata payment is based on the inability of the court . . . to add such a provision to the contract, and also upon the rule that . . . part performance under an express contract cannot . . . justify the imposition of a restitutionary obligation to pay on a quantum meruit basis.[9]

If the innocent party had the choice of refusing part performance but accepts part performance, there is a variation in the contract.[10] Partial performance does not need to be accepted or paid for unless the contract so allows. If partial performance is accepted, it must be paid for on a *pro rata* basis.

> [A] claim may be made by a party who has not completely performed if it can be inferred from the circumstances that there is a fresh agreement between the parties that payment will be made pro rata for work already done or goods already supplied under the original contract, as for example where a buyer of goods accepts less than the stipulated quantity. It is not, however, enough to bring this principle into play that the party from whom payment is demanded has received a benefit from the partial performance; he must have had, at the time when it became clear that there would not be exact performance, an opportunity to accept or reject the partial performance. Nor is it possible where that party had no such choice to bring an action upon a quantum meruit.[11]

iv. Induced Non-performance

Another exception to the general rule of complete performance is found where one party prevents performance of the contract by the other party. In this event, the innocent party may sue for the damages resulting from this breach of contract, repudiate the contract, or both.[12] Again referring to the scenario with Alice and the black Sub-Zero® refrigerator, consider the following. The shop delivers the correct model and colour of Sub-Zero® refrigerator to Alice's new home at the specified time. Alice refuses

to accept delivery. She refuses to allow the deliverymen to enter her home and orders them to leave her property. As the parties' contract provides that the shop must deliver to Alice a particular refrigerator by a particular time, Alice has prevented the shop from performing its contractual obligations. The shop can sue Alice and/or cancel the contract.

B. Agreement, Assignment, and Novation

A contract can be changed (the technical term is *varied*) or discharged by oral or written agreement.[13] A contract can be varied or discharged orally even if that contract was entered into in writing or by deed.[14] If the varying or discharging agreement is made by deed, there is no need to show consideration. A contract required to be in writing may be discharged orally, but cannot be varied unless evidenced by another contract in writing.[15]

Contractual rights, including options, may be transferred to a third party who was not named in the original contract through an *assignment*, even without the consent of the promisor.[16] However, liabilities under a contract and offers cannot be transferred without consent of the other party.[17] A contract right that has been assigned cannot be reversed if consideration has been paid for the assignment. The assignment ends the right of the party making the assignment (also referred to as the *assignor*). To revoke an assigned right, a court order for rescission is required.

Gratuitous assignments, similar to a promise to make a gift, in general can be freely revoked by the assignor. 'Assignment by act of the parties may be an assignment either of rights or of liabilities under a contract; or, as it is sometimes expressed, an assignment of the benefit or the burden of the contract.'[18]

An assignment of contract rights may arise as a guarantee for a loan, a gift, or a sale (in return for payment of the transfer of right). For example, consider a sale of a debt by the creditor to a third party, more specifically, a bank selling a long-term mortgage to another company. Additionally, as an aside, after the bank has assigned it rights to this mortgage, in order to end the assignor's right to payment under the assigned mortgage, the party receiving the assignment (also known as the *assignee*) should immediately notify the debtor. This would prevent the assignor from collecting payments from the debtor. Finally, note that an assignment may also be made through the operation of law, for example, in the event of death or bankruptcy.[19]

Novation is where a new contract is formed and substituted for the existing contract which is discharged.[20] Novation, unlike an assignment,

is with the consent or agreement of all the parties to the contract.[21] It is generally the use of novation to allow the introduction of a new party to the new contract and the discharge of a party to the former contract.[22] Under the common law, novation was the only method of assigning a contractual right.[23]

C. Repudiation and Anticipatory Breach

Repudiation is the refusal by one of the contracting parties to be bound by the contract's terms.[24] When a party repudiates a contract, that party intends no longer to be under any obligations created by the contract. Repudiation may take place when performance is due.

> Instead of merely failing to provide due performance at the stipulated time, a party may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract.[25]

Repudiation may thus also take place before performance is due. This is known as *anticipatory breach* or *anticipatory repudiation*. The meaning of these two terms is that the innocent party is expecting or anticipating the other party will breach the contract before the deadline for performing the obligation or obligations. For example, refer to the scenario concerning Alice's purchase of the refrigerator. After entering the contract but before delivery of the refrigerator, Alice calls the shop. She informs the shop that she will not pay more than 75 per cent of the agreed price of the refrigerator. The shop may anticipate that Alice will breach the contract when the refrigerator is delivered and payment becomes due.

Thus, repudiation by one party amounts to the wrongful refusal by that party to fulfil its contractual obligations. This act of repudiation would allow the innocent party to consider itself discharged from its obligations and sue for breach.[26] Note that a party's request to renegotiate the contract or purchase price is not an anticipatory breach.

As explained by one source:

> Repudiation takes place where a party expressly or impliedly refuses to carry out duties under the contract. Parties may also make it impossible for themselves to carry out the contract. . . . This is a kind of repudiation.
> . . . The repudiation may take place before the time when performance is due. In such a case, the breach which repudiates the contract is called 'anticipatory breach'. Because a party cannot bring a

> contract to an end by breaking it, however fundamental the breach, unless the other party accepts that breach as repudiation, the injured party has a choice. When a breach is committed before the contract date of performance, it may be sufficiently serious to allow the injured party to treat it as repudiation. If it is bad enough to be treated as repudiation, the injured party may either treat the contract at once as discharged and sue for damages (and possibly some other remedy), or leave the contract in existence until the contract date for performance. If the injured party chooses to wait, the party in breach may carry out its part of the contract at any time until the contract date or the other's acceptance of the repudiation. . . .
>
> If the term broken is a warranty, the breach is not a repudiation. Of course, a complete failure to perform, such as delivering a bicycle when the contract calls for a car – sometimes called fundamental breach – is also a repudiation.
>
> Unless the breach makes further performance of the contract impossible for the injured party, the injured party cannot be forced to accept the breach as repudiation but can go on performing the contract.[27]

Therefore, as explained above, when an anticipatory breach occurs, the innocent party may immediately sue for the breach. Alternatively, the innocent party may wait and urge the breaching party to perform. Once the injured party confirms the continuation of the contract, the innocent party cannot later decide to rescind the contract. An example is the case of *Long v Lloyd* [1958] 2 All ER 402. In this case, the plaintiff purchased a vehicle from the defendant. The vehicle had defects, allegedly known to the defendant at the time of the sale. Nonetheless, the plaintiff affirmed the contract after both parties agreed to share the costs of repairs to the vehicle. Subsequently, the vehicle broke down and the plaintiff attempted to rescind the contract. The court found that the plaintiff's previous decision to continue with the contract constituted an affirmation. This affirmation of the contract prevented the plaintiff from later rescinding the agreement.[28]

Damages for the breach of contract generally will be determined on the date of the anticipatory breach. This is the date the plaintiff first learned of the anticipatory breach and had the capability to sue in court. If, for example, a plaintiff buyer substantially delays in suing the defendant seller, then the plaintiff risks adverse price increases during the period of delay. However, anticipatory breach is not an available remedy if the innocent party has fully performed under the contract. The performing party must wait for the future payment date specified in the contract. To avoid this

problem, some parties insert an 'acceleration clause' into their agreement. This clause accelerates or makes all future payments due immediately, in the event that one payment instalment is breached. Acceleration clauses can be found in most mortgage contracts. The mortgagee bank fully performs by providing the mortgagor with the full amount of the loan. The mortgagor uses the loan to pay the seller for the flat which the mortgagor is buying. The mortgagor then repays this bank's loan in monthly instalments. Should the mortgagor default on one payment, all the payments become due immediately under the mortgage's acceleration clause.

D. Frustration

A contract is considered to be discharged by *frustration* when performance of the contract becomes impossible due to an unexpected or unforeseen change of the circumstances in which performance is required after the contract was made.[29] Thus, one party's non-performance will not be a breach of contract because the impossibility excuses the performance of the contract.

The change of circumstances must be without fault of either party, and the change makes the circumstances fundamentally different from what was reasonably anticipated by the parties at the time they made the contract.[30] The purpose of the doctrine of frustration is fairness: that it would be unfair to bind the parties to the contract under the new circumstances and under an essentially different bargain.[31]

This principle of contract law has been summarised in the case of *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL):

> Frustration of a contract takes place when there . . . [occurs] an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties . . . contemplated at the time of its execution that it would be unjust to hold them to the . . . [contract] in the new circumstances; in such case the law declares both parties to be discharged from further performance.[32]

To determine whether a party may successfully claim frustration of contract, a court will:

- interpret the contract terms in light of the contract's nature and the circumstances at the time of making the contract in order to reveal the scope of the parties' obligations;

- examine the situation after the frustrating event in order to determine the parties' obligations now if their contract is to be enforced; and
- compare the original obligations and the new obligations in order to decide whether the new obligations are radically different from the original obligations.[33]

A claim of frustration of contract may arise from several types of frustrating events:

- physical destruction of the subject matter of the contract
- delay making performance impossible or impracticable by becoming unduly burdensome and the obligations changed radically from that contemplated when the contract was executed
- death or incapacity of the performing party, especially where the original contract is for personal services
- cancellation of an expected event, which was the basis for making the contract (e.g., an agreement to view an event that was subsequently cancelled)
- after the contract was made, subsequent changes in the law which make performance impossible[34]

An example of a claim of frustration of contract arose during the Severe Acute Respiratory Syndrome (SARS) epidemic in Hong Kong. In the case of *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353, the tenant of a flat in Amoy Gardens attempted and failed to avoid the lease on the basis of frustration as the building in which the flat was located was quarantined by the Hong Kong government during the SARS epidemic. As part of this quarantine, the government isolated the occupants of the building by relocating these residents to remote locations.

The reasons for a claim of frustration cannot be self-induced.[35] In other words, a party cannot make it impossible for itself to perform its contractual obligations. Also note the consequences of frustration provided for under the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) at sections 16 to 18. The fact that the contractual obligations are made more expensive by a change in circumstances does not constitute frustration of a contract.[36]

E. Breach

A *breach* of contract occurs when at least one of the parties to a contract fails to perform its obligation in accordance with the contract terms.[37]

In other words, a party fails to do what it promised to do. In this situation, the party who fails to perform is frequently referred to as the defaulting party or the breaching party. The other party in this situation is frequently referred to as the innocent party, injured party, or non-breaching party.

A breach must be evaluated to determine its effect on the rights and duties of the parties. This is done by reviewing the contract as a whole, considering the parties' intentions as stated in the contract, or as the intentions may be inferred from the contract. A breach may arise in three ways: a repudiation of contract before performance is required, partial performance, or incomplete or improper performance.

A party's failure to honour its contractual promise is a breach of contract. A breach may be of an express term or of an implied term. This broken contractual promise may be a breach of warranty or a breach of condition. As previously discussed in Chapter 4, section B, a breach of warranty only allows the innocent party to claim damages. When the breach is trivial or minor, the other party is to continue with its contractual obligations. A defaulting party's breach of warranty does not give the innocent party a right to terminate the contract.

A breach of condition, however, may allow the innocent party to terminate the contract as well as claim damages because the breach is serious and fundamental to the contract. In this case, the innocent party has a right to terminate the contract. If the innocent party exercises this right, the non-breaching party is excused from fulfilling its obligations under the contract. Additionally, the innocent party may keep any benefit already received, providing that the innocent party terminated the contract as soon as possible and gave notification of the termination. Alternatively, the innocent party may decide to continue the contract rather than terminate the legally binding agreement when a breach of condition occurs. In this case, the breach of condition will be treated as a breach of warranty. In other words, if the innocent party chooses to continue with the contract, the innocent party can only sue for damages resulting from the breach.

As mentioned earlier, anticipatory breach occurs where one party repudiates the contract before the due date of performance, or where some of the contractual obligations remain unperformed. Repudiation may be expressed or implied, e.g., the party states its intention not to perform, or by its conduct indicates its intention not to perform its obligations under the contract.

Under this situation, the innocent party is excused from performing its obligations under the contract and may claim damages. The injured party

must *mitigate*, i.e., minimise its losses. Alternatively, the non-breaching party may refuse to accept the breach and confirm the contract's continuing existence, giving the other party an opportunity to change its position before the due date for performance.

Notes

Chapter 1

1. See Michael J. Fisher and Desmond G. Greenwood, *Contract Law in Hong Kong* (2nd edition, 2011) 7 [hereinafter *Fisher and Greenwood*]. For a discussion of the topic of employment, see 24 *Halsbury's Laws of Hong Kong* (2nd edition, 2012).
2. The Hong Kong Government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates *common law* as 普通法 and *common law jurisdiction* as 普通法司法管轄區. See the *BLIS Glossary* website at: http://www.legislation.gov.hk/eng/glossary/homeglos.htm.
3. H. G. Beale et al., eds., *1 Chitty on Contracts* para. 1-016 (31st edition, 2012) [hereinafter *Chitty*]; Betty M. Ho and Stephen Hall, *Ho and Hall's Hong Kong Contract Law 2* (3rd edition, 2013) [hereinafter *Ho*].
4. *Chitty* at para. 1-016; *Butterworths Hong Kong Contract Law Handbook* (3rd edition, 2013) 8 [hereinafter *Butterworths*].
5. *Chitty* at para. 1-018.
6. See id.
7. See id. at para. 1-020.
8. See, e.g., *Fisher and Greenwood* at 1 which defines a contract as a legally enforceable agreement.
9. 18 *Halsbury's Laws of Hong Kong* (2nd edition, 2015 reissue) para. 115.002 [hereinafter 18 *Halsbury's*].
10. The *BLIS Glossary* translates *legal contracts* as 合法合同 and *legally binding* as 具法律約束力.
11. Richard Stone and James Devenney, *The Modern Law of Contract* (11th edition, 2015) 312–13 [hereinafter *Stone*].
12. Carole Chui and Derek Roebuck, *Hong Kong Contracts* (2nd edition, 1991) paras. 1.3, 2.1 [hereinafter *Chui and Roebuck*].

Chapter 2

1. See 18 *Halsbury's* at paras. 115.011–115.012.
2. *Chitty* at para. 1-087 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)'.

   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. 1-088–1-104.
3. 18 *Halsbury's* at para. 115.010.
4. The *BLIS Glossary* translates *recognisance* as 擔保.
5. 18 *Halsbury's* at para. 115.010.
6. Id. at para. 115.013.
7. *Chitty* at para. 1-099.
8. 18 *Halsbury's* at para. 115.054 explains that the mode of acceptance in a unilateral contract: 'is 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, but in a unilateral contract the promise will be executed the moment it is made. . . . In the case of a unilateral contract, performance of his side of the contract constitutes acceptance by the offeree.'
9. *Chui and Roebuck* at para. 4.8: '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.' *Collateral* means *running side by side*. The consideration for a collateral contract is entering into the main contract in return for a collateral assurance. *Fisher and Greenwood* at 166.
10. *Chui and Roebuck* at para. 9.2.6; *Fisher and Greenwood* at 166.
11. 18 *Halsbury's* at para. 115.140 explains a collateral contract as 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'.
12. *Stone* at 176–77.
13. Id. at 197.
14. *Chitty* 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.' See also *Butterworths* at 75–77.

15. *Fisher and Greenwood* at 435. For a full discussion of this topic, see, e.g., id. at Chapter 16 ('Privity of Contract'); *Chitty* at Chapter 18 ('Third Parties'); *Ho* at Chapter 13 ('Privity').
16. *Fisher and Greenwood* at 443–45.
17. The consultation paper may be found at the following two websites: http://www.hkreform.gov.hk or http://www.hklii.org/hk/hklrc/reports/2005/3.doc. See *Fisher and Greenwood* at 444–49 for a review of the consultation paper.
18. The commission's report may be found at the following two web sites: http://www.hkreform.gov.hk or http://www.hklii.org/hk/hklrc/reports/2005/10/privity_of_contract.3.doc.
19. There are several items of note about this ordinance:
    - This law does not apply to certain agreements such as promissory notes, deeds of mutual covenant, or contracts of carriage.
    - The parties can specifically provide in their contract that this law does not apply to their agreement (section 4(3)).
    - Under certain situations, however, the parties might not be able to include in their contract a provision to remove the third party's rights (section 6).
    - In defending a claim for breach of contract, the offending party has against the third party the same defences as it does against the innocent party (section 8).
    - In defending a claim for breach of contract, the offending party is not liable both to the innocent party and to the third party (section 11).
20. The *BLIS Glossary* translates *deed* as 契據. See also *Ho* at 153–57.
21. See Chapter 3, section C and the accompanying footnotes. See also 18 *Halsbury's* at para. 115.011. The *BLIS Glossary* translates *specialty* as 蓋印文據.
22. *Black's Law Dictionary* (7th edition, 1999) 1350 [hereinafter *Black's Law Dictionary*] defines *seal* to be an 'impression or sign that has legal consequence when applied to an instrument'.
23. *Chitty* at para. 1-093.
24. Another reason for using a deed is that the party suffering a loss caused by a breach, i.e., the failure to follow the terms of the agreement, has a longer period in which to sue the breaching party.
25. *Chui and Roebuck* at para. 2.2.
26. Conveyancing and Property Ordinance (Cap 219) section 4(2).
27. Powers of Attorney Ordinance (Cap 31) section 2(2).

Chapter 3

1. See, e.g., *Charles Wild and Stuart Weinstein, Smith and Keenan's English Law: Text and Cases* (16th edition, 2010) 288.

2. 18 *Halsbury's* at para. 115.031.
3. *Black's Law Dictionary* at 1111. See also *Butterworths* at 13.
4. See *Ho* at 6.
5. Marnah Suff, *Essential Contract Law* (2nd edition, 1997) 2 [hereinafter *Suff*].
6. See *Ho* at 21–22, 27–28.
7. *Suff* at 2. See also *Ho* at 21–22, 27–28.
8. *Fisher and Greenwood* at 71–73. See M. P. Furmston, ed., *Cheshire, Fifoot and Furmston's Law of Contract* (16th edition, 2012) 77–80 [hereinafter *Furmston*].
9. *Lee Siu Fong Mary v Ngai Yee Chai* [2006] 1 HKC 157, 161 (citations omitted).
10. The topic of *collateral contract* is discussed in Chapter 2, section D. *Black's Law Dictionary* 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.'
11. *Chitty* at para. 2-027. See also *Butterworths* at 26–34.
12. See 18 *Halsbury's* at paras. 115.078–115.088; *Butterworths* at 26–34; *Chitty* at paras. 2-048–2-050.
13. 18 *Halsbury's* at para. 115.082 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.' Thus, the acceptance of an offer must be placed in the: 'control of the Post Office or of one of its employees authorised to *receive* letters. Handing letters to a postman authorised to *deliver* letters is not posting.' *Chitty* at para. 2-048 (emphasis in original).
14. For discussion on the application of the postal rule to telegrams, see 18 *Halsbury's* at para. 115.087.
15. Id. at para. 115-079. *Fisher and Greenwood* 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.'
16. In relation to acceptance by e-mails, see the Electronic Transactions Ordinance (Cap 553) which makes it clear that acceptance by e-mail will be effective only when received, unless the parties have agreed otherwise.
17. *Chitty* at para. 2-051.

18. *Susanto-Wing Sun Co Ltd v Yung Chi Hardware Machinery Co Ltd* [1989] 2 HKC 504, 506.
19. *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346, 350.
20. Id.
21. *Chitty* at paras. 2-008 and 2-010. See also *Ho* at 18–20.
22. 18 *Halsbury's* at para. 115.033. This authority continues by saying: '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.' Id.
23. Display of goods in a shop window has been held to be an invitation to treat. See, e.g., *Fisher v Bell* [1961] 1 QB 394 where the court decided 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 1959. A similar situation arose in the earlier case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401:

    > the customer was allowed to select goods from the shelves and take them to the cash desk. By the desk was a registered pharmacist who could prevent the removal of certain drugs from the store. The defendants were alleged to be in breach of an English statute which said there must be a registered pharmacist to 'supervise sale'. The main issue in the case was whether or not the display of goods on the shelves of the self-service store was an offer or an invitation to treat. If the display was an offer, then the taking of the goods from the shelf by the customer and putting them in his basket would, it was alleged, constitute an acceptance. The sale would, therefore, take place without the requisite supervision and 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 plaintiff was correct the customer, once he had placed the goods in his basket, could not then change his mind and substitute the goods for other goods without being liable to pay for the goods originally chosen. This would be commercially disastrous for self-service stores as customers would be too afraid to patronise them.
    >
    > A further explanation of the 'invitation only' finding was that the shopkeeper should have right to refuse to sell the goods to a customer since shops are, theoretically, places to bargain.

    See *Fisher and Greenwood* at 46–47.
24. *Ho* at 15.

25. *Chitty* at para. 2-008.
26. Id. at para. 2-010.
27. 35 *Halsbury's Laws of Hong Kong* para. 230.148 (2nd edition, 2013) (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).
28. *Currie v Misa* (1875) LR 10 Ex 153, 162.
29. *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847, 855.
30. Consideration can be categorised as *executed* and *executory*. As explained in *Ho* at 93: 'Executed consideration consists of performance (or forbearance) of the required act constituting the price for the promise, e.g., the return of a lost item (for a reward or promise thereof). Executory consideration consists of a promise, express or implied, to perform (or forbear from performing) the required act, e.g., promise of a reward (for the return of a lost item).'

    Fisher and Greenwood at 89 states: 'It is generally the case that "executory" consideration is just as valuable as "executed" consideration: i.e. the promise of an act is as effective as the act itself. For example, if a seller of goods fails to deliver them on time, the buyer has a right to sue even though the goods have not yet been paid for. Executory consideration exists in the buyer's promise to pay for the goods when required to do so. Provided that the buyer has not indicated that he is no longer willing or able to proceed he is entitled to sue the seller for the latter's non-delivery. In cases of "unilateral" contracts, where only one party has undertaken obligations, the promisee's consideration can only exist in an act rather than a promise, since he gives no promise. Mrs. Carlill, for example, did not make any promises to the Carbolic Smoke Ball Co. Her consideration existed in the *act* of using the ball as directed; it was, in other words, executed rather than executory.'

    For further discussion, see, e.g., 18 *Halsbury's* at paras. 115.117 and 115.121. The *BLIS Glossary* translates *consideration* as 代價.
31. *Thomas v Thomas* (1842) 2 QB 851, 859.
32. 18 *Halsbury's* at para. 115.117. Consideration for a promise may consist in either some benefit for the promisor, or some disadvantage incurred by the promisee, or both. Id.
33. Id. at para. 115.126 states: 'Whilst consideration need not be adequate it must be of some value. It has been settled that the following are no consideration: past consideration; a promise to do an act which is obviously impossible, or which has no legal effect; a promise which does not involve any legal obligation; or, possibly, a promise which is illegal or void.'

    Fisher and Greenwood at 83 notes:

    > The rule is that "Consideration must be 'sufficient' (of some value) but need not be 'adequate' (of equal value to the other party's

> consideration)." There is nothing wrong, in consideration terms, with an agreement to buy a valuable painting for $10 . . .
>
> Consideration is, essentially, a token of a party's intention to make a legally binding contract as opposed, for example, to a non-binding social arrangement. That token takes the form of the giving of something valuable in the eyes of the law. Consideration may not prove that a bargain is fair or equal but it *is* evidence of a legally enforceable contract, as opposed to a mere friendly arrangement never intended to be contractual. (emphasis in original)

For a further discussion on this topic of sufficiency of consideration, see, e.g., *Furmston* at 108–44.

34. See, e.g., *Thomas v Thomas* (1842) 2 QB 851. See also *Butterworths* at 39–43.
35. *Chitty* at para. 3-014 (emphasis in original). See also 18 *Halsbury's* at para. 115.124. The *BLIS Glossary* translates *valuable consideration* as 有值代價.
36. *Chitty* at para. 3-022.
37. Id. at paras. 3-039–3-040. See also *Ho* at 122–25, 127–29.
38. *Fisher and Greenwood* at 89 (emphasis in original).
39. *Pao On v Lau Yiu Long* [1980] AC 614, 629 (PC).
40. For present purposes, consider *economic duress* to refer to unfair business pressure. Economic duress is discussed in Chapter 5, section B.iii.
41. *Williams v Roffey Bros* [1991] 1 QB 1, 15–16.
42. See, e.g., the discussion in *Fisher and Greenwood* at 99–105.
43. *UBC (Construction) Ltd v Sung Foo Kee Ltd* [1993] 2 HKLR 207.
44. The *BLIS Glossary* translates *equity* as 衡平法 and *equitable remedy* as 衡平法補救. *Equitable relief* may be translated as 衡平法濟助.
45. The *BLIS Glossary* translates *estoppel* as 不容反悔法. Some sources refer to this doctrine as *promissory estoppel*. 18 *Halsbury's* at para. 115.394 describes this doctrine:

> Similar to waiver is the doctrine of promissory or equitable estoppel, whereby a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that position, or will be allowed to do so only upon giving reasonable notice. This principle differs from estoppel properly so called in that (1) it applies to promises, not representations of fact; (2) it is generally only suspensory in operation; and (3) it is not clear to what extent the representee need have changed his position to his detriment in reliance on the representation.

A party's waiver of the right to fully enforce all the terms of a contract is an intentional abandonment of a contractual right. The waiver of a promise or condition may be expressed or may be implied from a party's conduct.

46. As stated in 44 *Halsbury's Laws of Hong Kong* para. 340.110 (2nd edition, 2011) [hereinafter 44 *Halsbury's*]:

> Estoppel at law arises where one person makes to another a clear and unequivocal representation of existing fact with knowledge of its falsehood and with the intention that it should be acted upon. In some circumstances, failure to speak or act may amount to a representation, if there is a duty to speak or act owed to the other person. If, in these circumstances, the person to whom the representation is made acts upon it to his detriment, the person making it may not thereafter assert in any proceedings which may arise that the facts were otherwise than as he represented them to be.
>
> Equitable estoppel is more flexible, both in its initial requirements and also in its consequences, than estoppel at law. Equitable estoppel takes two forms: proprietary estoppel . . . and promissory estoppel. . . . it has been suggested that there is one simple synthesis of both forms to the effect that it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed another to assume to his detriment.

47. This involves a representation of some type or kind. 18 *Halsbury's* at para. 115.396: 'The basis of promissory estoppel is that one party has been led by the conduct of the other to believe that that other's strict rights under the contract will not be enforced. . . . a promissory estoppel can only be founded upon a clear and unambiguous promise of future action.' Again, for equitable estoppel to apply, there must be a representation by one party to the contract which is relied upon by the other party to the contract to its detriment. Id. at para. 115.397.

48. *Fisher and Greenwood* at 114. In the case of *Dixie Engineering Company Ltd v Vernaltex Company Ltd (t/a Wing Wo Engineering Company)* [2003] HKCU 136, para. 81, the Court of Appeal stated:

> Broken down into its component parts, the doctrine of equitable or promissory estoppel, insofar as it applies in contractual situations, consists of:
>
> (1) A clear and unequivocal representation by A to B that he will not rely on his strict contractual rights. The representation may be by words or by conduct.
> (2) The representation by A must be made with the intention by him "or at least the knowledge" that B will act on it.
> (3) B must in fact have acted in reliance on the representation.

49. The operation of equitable estoppel:

> Like waiver, a concession amounting to a promissory estoppel will generally only suspend the strict legal rights of the party granting it; and he may revert to these rights upon giving reasonable notice of his intention to the other party. . . .
>
> A concession taking effect as a promissory estoppel may, however, become permanently binding and extinguish an obligation

> if it ceases to be possible for the representee to revert to his original position.

18 *Halsbury's* at para. 115.398.

50. *Fisher and Greenwood* at 115.

51. *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, 643–44. Both 18 *Halsbury's* at para. 115.404 and *Chitty* at para. 22-012 use this definition for the term *accord and satisfaction*.

52. 18 *Halsbury's* at para. 115.405. Exceptions to this general rule are set out in id.

53. *Chitty* at paras. 22-016–22-017. Id. at para. 22-016 explains in relation to the partial payment of a debt: 'Where there is a claim for a liquidated sum, the liability for which is not in dispute, the acceptance of a smaller sum in satisfaction does not relieve the debtor for there is no consideration for the creditor's abandonment of the balance. This rule, which is generally known as the rule in *Pinnel's Case*, is nevertheless subject to a number of qualifications.'

54. The *BLIS Glossary* translates *compromise* as 妥協.

55. See generally Bankruptcy Ordinance (Cap 6) on voluntary arrangement. Section 2 of this ordinance states in part: '"voluntary arrangement" (自願安排) means a composition in satisfaction of a debtor's debts or a scheme of arrangement of a debtor's affairs.'

56. 18 *Halsbury's* at para. 115.409.

57. There is a particular type of contract known as a *specialty contract*, *contract under seal* or *deed* where consideration is not required. 'A deed is a document which takes its effect from its formal nature.' *Chui and Roebuck* at para. 11.1. *Chitty* at para. 1-105 states:

> 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.

58. 18 *Halsbury's* at para. 115.016: 'The only contracts which are required by the rules of common law to be made by deed are contracts made without valuable consideration.' Id. at para. 115.011: 'A promise made by deed . . . derives its validity from its form alone; it is regarded as binding at common law even without consideration, except where void, for example as being in restraint of trade, or illegal. Conveyances of land or of any interest in land must be made by deed.'

59. *Chitty* at para. 1-113 expounds upon this requirement of delivery: 'It remains the case . . . that "[w]here 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.' See also *Ho* at 154–57.
60. Concerning agreements contained in a deed, the rule is that: 'equity never favoured voluntary transactions even if they were contained in a deed, and refused to grant its special remedies in cases where these were without consideration. So it has been laid down that specific performance will not be decreed of a contract contained in a deed which is entirely without consideration.' *Chitty* at para. 1-128.
61. See id. at paras. 3-021 and 27-030. See Chapter 7, section C, on the subject of *specific performance*. The *BLIS Glossary* translates *injunction* as 禁制令 or 強制令.
62. *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643, 659.

Chapter 4

1. 18 *Halsbury's* at para. 115.073. See, e.g., the following cases which analysed whether a contract existed and, if so, its interpretation: *Kabushiki Kaisha Proje Holdings v King Power Group (Hong Kong) Ltd* [2013] HKEC 1574; *Links Internatioinal* [*sic*] *Relocations Ltd v Swift Christopher Lee* [2013] HKEC 1678.
2. *Professional Associates v Polytek Engineering Co Ltd* [1986] HKLR 20, 34.
3. *Chitty* at para. 12-001.
4. *Pacific Dunlop Garments Ltd v Fundamental Global Ltd* [2014] HKEC 609 (CA), para. 25.
5. Id. at para. 36.
6. *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351 (CFA), 361–62.
7. 18 *Halsbury's* at para. 115.154.
8. See id. at para. 115.156; *Chitty* at Chapter 13 ('Implied Term'); Kim Lewison, *The Interpretation of Contracts* (5th edition, 2011) 269–70 [hereinafter *Lewison*].
9. *Fisher and Greenwood* at 168.
10. Id. at 171 citing to *Attorney General v Melhado Investments Ltd* [1983] HKLR 327, 329; *Shun Shing Hing Investment Co Ltd v Attorney General* [1983] HKLR 432, 440; *On Park Parking Ltd v Secretary of Justice* [2004] 3 HKC 476. See also the comments of the Court of Final Appeal in *Sinoearn International*

Ltd v Hyundai-CCECC Joint Venture (2013) 16 HKCFAR 632 that courts generally should adopt a 'business common sense' approach to contract interpretation. Having said that, the court stated that: 'in determining the meaning of the language of a commercial contract, the law generally favours a commercially sensible construction . . . In this case, I do not think commercial common sense provided an answer. . . . there is no support in the language of the contractual documents for the Court of Appeal's conclusion, language over which . . . [the parties] had control. There is no relevant commercial common sense which would enable the court to override the language used [in the contract].' Id. at 660–61.

11. For the avoidance of confusion, the definition provided by *Chitty* at para. 12-025 is adopted:

> The word "condition" is sometimes used . . . to mean simply "a stipulation, a provision" and not to connote a condition in the technical sense of that word. . . . The most commonly used sense of the word "condition" is that of an essential stipulation of the contract which one party guarantees is true or promises will be fulfilled. Any breach of such a stipulation entitles the innocent party, if he so chooses, to treat himself as discharged from further performance of the contract, and notwithstanding that he has suffered no prejudice by the breach. He can also claim damages for any loss suffered.

There are two uses of the word *condition* in contract law. A condition of the type discussed above can be regarded as a promise, the breach of which allows the innocent party to sue. This meaning is different from that of a *contingent condition* [或有的]. If a contract requires an event to occur, but no party promises that the event will occur, then it is a contingent condition to the party's performance under the contract. The contingent condition is a provision that on the happening of some event an obligation or the contract shall come into force. This contingent condition is termed a *condition precedent* [先决條件]. For example, a building contract can be agreed by the parties but is made contingent upon the government's issuance of permits. The issuance of the government permits is the condition precedent. Once the permits are issued, the condition is met and a legally binding agreement comes into effect.

See, e.g., id. at paras. 12-026–12-029. A related concept is a *condition subsequent* [後決條件]. A provision may provide that an obligation or the contract is ended, without any fault of either party, if a condition does not continue to be satisfied. Thus, if the specified condition subsequent occurs, the contract is ended. A party may waive this condition if it is inserted solely for the party's own benefit. This is demonstrated in the case of:

> *Head v Tattersall* where A bought a horse from B which B warranted to have been hunted with the Bicester hounds. If it did not answer its description, A was to have the right to return it by a certain day. The horse did not answer its description and A accordingly returned it before the day. In the meantime, however, the horse had been

> injured without A's fault. It was held that the injury did not cause A to lose his right to return the horse and he could recover the purchase price paid.

Chitty at para. 12-030. The *BLIS Glossary* translates *contingent condition* as 或有的, *condition precedent* as 先決條件, and *condition subsequent* as 後決條件.

12. *Chitty* at para. 12-031 defines this term: 'In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not a right to treat the contract as repudiated. The use of the word "warranty" in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract, the breach of which by one party does not entitle the other to treat his obligations as discharged.' See also *Butterworths* at 255 (discussing the Sale of Goods Ordinance (Cap 26) section 55).
13. 18 *Halsbury's* at para. 115.360.
14. *Chui and Roebuck* at para. 4.9.2. Another authority explains: 'Some contractual undertakings are too complex to be fitted into that scheme and the legal consequences of breach of such an undertaking . . . [depend] upon the effect of the breach. If the breach deprives the innocent party of substantially the whole benefit of the contract, or, in other words, if it goes so much to the root of the contract that it makes further commercial performance of the contract impossible, in addition to any remedy in damages the innocent party will be entitled to be discharged from further obligation; but if the event does not have that effect its consequences can be remedied only by an award of damages.' 18 *Halsbury's* at para. 115.362.
15. *Chitty* at para. 12-035. See also *Furmston* at 199–205; *Ho* at 246–250.
16. *Chitty* at para. 12-034.
17. As explained by 18 *Halsbury's* at para. 115.151:

> During the course of the formation of a contract, one of the persons who are to become parties to the contract may make representations to another such person. A representation is a statement made by one party (the representor) to another party (the representee) which relates, by way of affirmation, denial, description or otherwise, to a matter of fact or present intention.
>
> A representation of fact may or may not be intended to have contractual force; if it is so intended, it will amount to a contractual term; if it is not so intended, it is termed a mere representation.

The *BLIS Glossary* translates *representation* as 陳述.

18. 18 *Halsbury's* at para. 115.152. An example of the factors for determining intention is set out in id.
19. *Chui and Roebuck* at para. 4.3 notes: 'We have to allow for what is known as "trader's puff". . . . One rule of thumb is that when the remark concerns facts which can be checked, it is more likely to be a representation. So if a car

salesman says "this car has only had one owner", this cannot possibly be a mere puff, for a statement of fact is being made. If he says "this is a delightful little car", that sounds more like a puff.'

20. *Fisher and Greenwood* at 221.

21. In *Bannerman v White* (1861) 9 WR 784, the defendant intended to purchase grain from the plaintiff. During the negotiations, the defendant stated that he would not purchase any grain grown using sulphur. The plaintiff stated that no sulphur had been used in the cultivation. In fact, sulphur was used in growing the grain. The parties then entered into the contract for the sale and purchase of the grain. The court held that the plaintiff's assurance amounted to a term of the contract.

22. See Chapter 7, section A and section C for discussion on *damages* and *specific performance* respectively. *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. *Black's Law Dictionary* at 1297 defines *equitable remedy* as 'a nonmonetary 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; even-handed 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 noted by *Fisher and Greenwood* 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* translates *equity* as 衡平法 and *equitable remedy* as 衡平法補救. *Equitable relief* may be translated as 衡平法濟助.

23. *Chui and Roebuck* at para. 4.7.2.9. For cases involving the issue of interpretation of contract, see, e.g., *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279; *Konwall Construction & Engineering Co Ltd v Strong Progress Ltd* [2013] 3 HKLRD 503; *Paul's Model Art GmbH v UT Ltd* [2013] HKEC 1397.

24. *Chitty* at paras. 12-043–12-044 (emphasis in original). As for the general rules of construction or interpretation used by the courts, see id. at paras. 12-045–12-133; the cases cited in the previous note and in note 1.

25. Krishnan Arjunan and Abdul Majid bin Nabi Baksh, *Business Law in Hong Kong* (2nd edition, 2009) [hereinafter *Arjunan and Nabi Baksh*] translates *contra proferentem* as 不利於提出合約的一方.

26. *Chui and Roebuck* at para. 4.7. In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, 77, the court commented on *contra proferentem* by saying: 'a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interest so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.'

27. 18 *Halsbury's* at para. 115.363 explains: 'There will be a fundamental breach . . . entitling the innocent party to be discharged, if the breach has produced a situation fundamentally different from anything which the parties could, as reasonable men, have contemplated when the contract was made. . . . a fundamental term is no more than a condition, that is a term which the parties have agreed either expressly or impliedly which goes to the root of the contract, so that any breach of that term . . . will allow the innocent party to treat himself as discharged.'

    Chitty at para. 12-021 describes *fundamental term* as being an essential part of the agreement: 'The fundamental term has been described as part of the "core" of the contract, the non-performance of which destroys the very substance of the agreement. . . . Examples usually cited are those where a seller delivers goods wholly different from the agreed contract goods or delivers goods which are so seriously defective as to render them in substance not the goods contracted for: e.g. the delivery of beans instead of peas, of pinewood logs instead of mahogany logs, or of a vehicle which is incapable or barely capable of self-propulsion instead of a motor car. In each case, so it is said, there is a breach of the fundamental term, that is to say, of the "core" obligation to deliver the essential goods which are the subject-matter of the contract of sale.'

28. *Chui and Roebuck* at para. 4.9.2. See *Butterworths* at 102–5.

29. *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 QB 44, 61.

30. The *BLIS Glossary* translates *exclusion clause* as 免責條款. *LexisNexis, Hong Kong English-Chinese Legal Dictionary 718 (2005)* [hereinafter *LexisNexis*] translates *exemption clause* and *limitation clause* as 免責條款 and 限制條款 respectively.

31. *Chui and Roebuck* at para. 8.4.

32. The *BLIS Glossary* translates *public policy* as 公共政策. For a more detailed explanation in interpreting an exemption clause, see *Lewison* at 574–78.

33. See *Lewison* at 586–89 for a discussion of ambiguous exemption clauses and id. at 609–15 for a discussion of courts' interpretation of exemption clauses.

34. 18 *Halsbury's* at para. 115.174 provides in detail:

For an exclusion clause to be incorporated into a contract, the party against whom it is to operate must be given reasonable notice of its existence. Whether such notice has been given is determined according to the following principles:

(1) If the party against whom the clause operates has actual knowledge of the clause at the time when the contract is concluded he is inevitably bound by it.

(2) When there is no actual knowledge, the party against whom the clause operates will not be bound if he has no reason to believe that the document containing the clause contained contractual terms.

(3) If the party against whom the clause operates has reason to believe that a document given to him contains contractual terms he may be bound by those terms, including any exclusion clause, even though he does not choose to read the document; if the document contains what is reasonably necessary to bring the terms to the attention of a reader, the recipient will be bound, but he will not be bound if it does not do so.

(4) If the party putting forward the exclusion clause in his favour (the proferens) has done that which is normally sufficient to give reasonable notice of the clause, it may bind the other party even though, due to some personal disability, he is unable to understand the clause. It may be, however, that if such disability is known to the party seeking to impose the exclusion clause he must take such further steps as are reasonable to bring the clause to the notice of the person under the disability.

(5) Where the exclusion clause upon which a party seeks to rely is printed only in English or only in Chinese and the other party cannot read that language, it is necessary to ask the further question: Has the party relying on the unsigned term done all that could be reasonably required of him to draw the other party's attention to the existence of terms in the document in such a way that the other party cannot be heard to say that he did not read them?

(6) It may be that the more onerous the consequences of the exclusion clause for the party on whom it is imposed, the more forceful must be the notice which he is given of it.

(7) In the absence of fraud or misrepresentation a party will be bound by an exclusion clause in a document which he has signed, provided at least that the document appeared to be of a contractual nature and that the term was capable of exclusion.

(8) If the effect of an exclusion clause is misrepresented by the party seeking to impose it, or by his agent, he will be held to the meaning of the clause as represented; and a similar principle applies where that party or his agent gives a collateral assurance that varies or extinguishes the effect of the exclusion clause.

35. *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169.
36. 18 *Halsbury's* at para. 115.174.
37. *Ying Wei (Hop Yick) Cargo Service v Nanyang Credit Card Co Ltd* [1993] 1 HKC 56, 59.
38. For a summary of the provisions in this ordinance, see *Butterworths* at 272–73.
39. 18 *Halsbury's* at para. 115.194; *Lewison* at 468–69. See section 8 of the Control of Exemption Clauses Ordinance (Cap 71).
40. Schedule 1 of the Control of Exemption Clauses Ordinance.
41. See, e.g., section 3 of the Control of Exemption Clauses Ordinance which provides in relevant part:

(1) . . . the requirement of reasonableness for the purposes of this Ordinance and section 4 of the Misrepresentation Ordinance (Cap 284) is satisfied only if the court . . . determines that the term was a fair and reasonable one . . . having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining . . . whether a contract term satisfies the requirement of reasonableness, the court . . . shall have regard in particular to the matters specified in Schedule 2; but this subsection does not prevent the court . . . from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Ordinance is satisfied only if the court . . . determines that it would be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) In determining (under this Ordinance or the Misrepresentation Ordinance (Cap 284)) whether a contract term or notice satisfies the requirement of reasonableness, the court . . . shall have regard in particular . . . to whether . . . the language in which the term or notice is expressed is a language understood by the person as against whom another person seeks to rely upon the term or notice.

(5) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this Ordinance or the Misrepresentation Ordinance (Cap 284)) whether the term or notice satisfies the requirement of reasonableness, the court . . . shall have regard in particular (but without prejudice to subsection (2) or (4)) to–

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

See also Schedule 2 of the Control of Exemption Clauses Ordinance which provides additional guidelines for determining *reasonableness*:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

42. 18 *Halsbury's* at para. 115.204.

43. *David Friedman v Sieger Ltd* [2014] HKEC 44, para. 20. See also cases cited in the notes in section A of this chapter; *Lewison* at Chapter 8 ('Ambiguity and Uncertainty').

Chapter 5

1. Note the differences between a *void* contract, a *voidable* contract and an *unenforceable* contract. A void contract has no legal effect. Strictly speaking, no contract has ever come into existence at all. For example, at common law, a contract formed by mistake is void. A voidable contract is a valid agreement until any party thereto raises a vitiating factor (see the discussion in this section on vitiating factors) and wants to avoid it. A contract involving misrepresentation is an example of a voidable contract. An unenforceable contract is a valid contract but because of some reason the parties cannot enforce

the contractual rights/duties through a court, e.g., contract (not for necessity) with a minor or oral contract for sale of land. *Ho* at 285–86. The *BLIS Glossary* translates *void* as 無效, *voidable* as 可使無效, and *unenforceable* as 不能強制執行.

2. 18 *Halsbury's* at para. 115.030 notes: 'In general, a valid contract may be made by any person recognised by law as having legal personality, that is natural persons, corporations and the Hong Kong Special Administrative Region. However, the following classes of persons are in law incompetent to contract, or are only capable of contracting to a limited extent or in a particular manner: (1) bankrupts; (2) minors; (3) persons of unsound mind; (4) alien enemies; (5) drunkards; (6) corporations; (7) companies; (8) partnerships; and (9) receivers of companies.'

3. See Interpretation and General Clauses Ordinance (Cap 1) section 3, which states in part: '"adult" (成人、成年人) means a person who has attained the age of 18 years'. See also Age of Majority (Related Provisions) Ordinance (Cap 410) section 2, which states in part:

> (1) . . . a person shall attain full age on attaining the age of 18 years.
> (2) A person who, on the date of commencement of this Ordinance, has already attained the age of 18 years but not the age of 21 years, shall attain full age on that date.

4. See Mental Health Ordinance (Cap 136) section 2 which provides, in part, definitions for the following conditions:

> "mental disorder" (精神紊亂)
> "mentally disordered" (精神紊亂)
> "mental handicap" (弱智)
> "mental incapacity" (精神上無行為能力)
> "mentally disordered person" (精神紊亂的人)
> "mentally handicapped person" (弱智人士)
> "mentally incapacitated person" (精神上無行為能力的人)
> "psychopathic disorder" (精神病理障礙)
> "sub-average general intellectual functioning" (低於平均的一般智能)

5. Section 46 of the District Court Ordinance (Cap 336) states:

> No person shall by reason of his not having attained the full age . . . be exempted from liability for any debt, damages or demand arising under an agreement made before the date of commencement of the Age of Majority (Related Provisions) Ordinance (Cap 410) where the debt, damages or demand–
>
> (a) does not exceed the sum of $60000; or
> (b) has been reduced to a sum not exceeding $60000 by reason of the plaintiff having abandoned the amount in excess of $60000 in his cause of action.

See also Age of Majority (Related Provisions) Ordinance (Cap 410) section 4.

6. *Chui and Roebuck* at para. 11.3.3. See also *Chitty* at paras 8-001–8-068.
7. See, e.g., Companies Ordinance (Cap 622) section 115 to section 120, which provides: requirements with respect to memorandum, powers of a company, power limited by memorandum, etc., and exclusion of deemed notice.
8. A recent Hong Kong case has reviewed some of the items which we will be addressing in this section. In *Midland Realty (Comm & Ind) Ltd v NCF (HK) Ltd* [2015] HKEC 905, the court stated:

> 62. Where one person makes a false representation to another with the object and result of inducing the representee to enter into a contract with him or her, the representee is generally entitled to rescind the contract.
>
> 63. Statements concerning the object or effect of a document or words in documents are statements of fact and, as such, are representations.
>
> 64. Statements concerning private rights, as distinct from the general law, are statements of fact.
>
> 65. The question is whether a person was induced by the representation and it is a question of fact to be asked in respect of the particular representee, as opposed to an objective reasonable bystander.
>
> 66. If a representation is such that it was likely that a person in the representee's position would rely on it, a court may find it easier to believe the representee's assertion that he did rely on it. The materiality of the statement is evidence that goes towards establishing reliance.
>
> 67. A misrepresentation is material if it is something that induces the person to whom it is made to contract on the terms on which he does contract . . . If a man has a material misstatement made to him which may, from its nature, induce him to enter into the contract, it is an inference that he was induced by it to enter into the contract.
>
> 68. The representation need not be the sole or predominant cause of entering into the contract. As long as any one of the representee's motives for entering into the contract is vitiated by the misinformation given by the other party, it is enough to undermine the whole transaction. (citations omitted)

   For in-depth analysis of this topic, see *Chitty* at paras. 6-001–6-044; 6-099–6-107. See also *Butterworths* at 106–9.
9. See the case of *Edgington v Fitzmaurice* (1885) 29 Ch D 459. *Furmston* at 340 defines misrepresentation as follows: 'A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, [while not part] of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue. The representor's state of mind and

degree of carefulness are not relevant to classifying a representation as a misrepresentation but only to determining the type of misrepresentation.'

The *BLIS Glossary* translates *innocent misrepresentation* as 無意的失實陳述, *fraudulent or reckless misrepresentation* as 有欺詐成分或罔顧後果的失實陳述, and *negligent misrepresentation* as 疏忽的失實陳述.

10. *Fisher and Greenwood* at 213.
11. Id.
12. *Chui and Roebuck* at para. 5.2.1.
13. *LexisNexis* translates *uberrimae fidei* as 完全坦率真誠.
14. *Smith v Land and House Property Corp* (1884) LR 28 Ch D 7, 12.
15. *Chitty* at para. 6-012; *Ho* at 294–95. As stated by the court in the case of *Kwok Wing Kiu v Boxing Promotions Ltd* [2013] HKEC 798: 'It is trite that if a person is prevented from following a future intended course of action or simply changes his mind, this will not render the statement as to his original intention a misrepresentation.' Id. at para. 25 (citations omitted).
16. *Rescission* is the right allowed in equity to the innocent party to cancel the contract, if it so chooses. If the injured party selects this choice, the contract is rescinded and the parties are placed back into their pre-contract positions.

    18 *Halsbury's* at para. 115.353 defines the terms as follows: 'Rescission is the name given to a process whereby an existing contract is brought to an end and the effects of its existence are cancelled or terminated . . . it seems that where rescission is sought on equitable grounds its effect is to restore the parties to the position before the contract was entered into, whereas rescission at common law for breach simply discharges the parties from further obligations to perform the contract.'
17. *Ho* at 290 notes the term *innocent misrepresentation* should refer to misrepresentation made without fraud and without negligence. *Chitty* at paras. 6-005 and 6-099 defines the term *innocent misrepresentation* as a representation which is neither fraudulent nor negligent.
18. 44 *Halsbury's* at paras. 340.011–340.015.
19. See, e.g., *Chitty* at para. 6-099, explaining: 'The term "innocent misrepresentation" is here used to mean a representation which is neither fraudulent nor negligent, and the general rule remains . . . that no action for damages lies for a mere innocent misrepresentation . . . a misrepresentation will found a claim for damages if it can be construed as a contractual promise, and is either part of a wider contract, or is itself supported by consideration. This may happen in two principal types of case. First, where the representor and representee themselves enter into a contract after the misrepresentation was made. Here, if the misrepresentation becomes a term of the contract, an action for damages will lie, whether the misrepresentation was fraudulent, negligent or innocent. Secondly, the representee may enter into a contract with a third party as a result of the misrepresentation. Even in this situation, it is often possible to construe the misrepresentation as a collateral contract, the consideration for

which is supplied by the fact that the representee enters into the contract with the third party.'

20. What constitutes *too much time* depends upon the circumstances, according to the court in the case of *Leaf v International Galleries* [1950] 2 KB 86. See also 18 *Halsbury's* at para. 115.479. The *BLIS Glossary* translates *equitable doctrine* as 衡平法則 and *laches* as 就行使權利方面的疏忽延誤.

21. Section 2 of the Misrepresentation Ordinance (Cap 284) provides:

> Where a person has entered into a contract after a misrepresentation has been made to him, and–
>
> (a) the misrepresentation has become a term of the contract; or
>
> (b) the contract has been performed,
>
> or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Ordinance, notwithstanding the matters mentioned in paragraphs (a) and (b).

22. The *BLIS Glossary* translates this term as 付出價值的真誠購買人 and provides this alternative translation of *bona fide purchaser* as 真誠買方.

23. For an in-depth analysis of this topic, see *Chitty* at paras. 6-001–6-044; 6-046–6-071.

24. *Derry v Peek* (1889) 14 App Cas 337, 374. *Ho* at 288 states: 'A fraudulent misrepresentation then is one made without honest belief in its truth. This dishonesty can be proved by showing that the representor knew of the falsity of his representation, or that he shut his eyes to the facts or deliberately abstained from inquiry into them. This formulation suggests some moral blameworthiness, but it is not necessary to prove moral blame.'

25. *Chitty* at para. 6-047, and also notes at paras. 6-049–6-050. In order to establish fraudulent misrepresentation, the plaintiff needs to show the defendant's lack of an honest belief. *Chitty* states at paras. 6-049–6-050:

> The requirement of proof of the absence of honest belief does not, however, mean that the claimant must prove the defendant's knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew that it was false.
>
> Further, it is not necessary to establish that the defendant's motive was dishonest.

26. Id. at para. 6-047.

27. The *BLIS Glossary* translates *avoid* as 廢止.

28. *Fisher and Greenwood* at 234 (emphasis in original).

29. For an in-depth analysis, see *Chitty* at paras. 6-001–6-044; 6-046–6-098.

30. *Butterworths* at 110 refers to *negligent misrepresentation* as: 'A misrepresentation is innocent if there is honest belief in its truth, which becomes negligent misrepresentation if the representor had no reasonable grounds to believe in its truth. A negligent misrepresentation results from want of care, skill or competence or lapse of memory, whereas a fraudulent misrepresentation results from dishonesty.'
31. *Stone* at 315. For another analysis of *mistake*, see Clemence Yeung, *The Law of Unjust Enrichment in Hong Kong* (2008) 217–57 [hereinafter *Yeung*].
32. *Stone* at 312.
33. *Fisher and Greenwood* at 245.
34. *Chui and Roebuck* at para. 5.4.
35. Id.
36. *Fisher and Greenwood* at 245. If a mistake is *operative*, it is sufficiently serious to justify court intervention. *Stone* at 315n15.
37. The *BLIS Glossary* translates *ab initio* as 一開始 and *Arjunan and Nabi Baksh* at *liii* translates *ab initio* as 由最初開始 respectively. As for the consequences of payments made under this situation, see, e.g., Andrew Burrows, *A Restatement of The English Law of Unjust Enrichment* (2012) 9–10 [hereinafter *Burrows*].
38. See *Ho* at 379–87; 44 *Halsbury's* at paras. 340.006–340.010. *LexisNexis* translates *rectification* as 糾正. The *BLIS Glossary* translates *rectify* as 更正.
39. *Chui and Roebuck* at para. 5.5. Rectification is: 'where a contract has by reason of a mistake common to the contracting parties been drawn up so as to [be contrary to] . . . the terms intended by both as revealed in their previous oral understanding, the court will rectify the document so as to carry out such intentions. . . . Rectification will not be ordered . . . [if] a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all, nor if they decided deliberately to omit the issue. In such cases the written agreement must be construed as it stands.' *Chitty* at para. 5-111.
40. *Codelfa Construction Proprietary Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 346. For a discussion of the difference between correction of an error and the rectification of a contract, see *Lewison* at 468–69.
41. As for a mistake of fact: 'It has long been clear that money paid under a mistake of the payer as to a material fact is, in certain circumstances, recoverable. Mistake in this context means lack of knowledge of the absence of liability, but it is notoriously difficult to make an authoritative statement of the principles upon which recovery is based.' *Chitty* at para. 29-030.

    As for a mistake of law, id. at para. 29-041 states: 'Despite a dubious legal foundation and the difficulty of drawing any clear dividing line between "law" and "fact", for many years as a general rule money paid under a mistake as to the general law, or as to the legal effect of the circumstances under which it is paid, but with full knowledge of the facts, was irrecoverable.'

Traditionally, payments made under mistake of law (as opposed to mistake of fact) were not recoverable. However, this general rule that mistake of fact is operative while mistake of law is inoperative is no longer followed in the United Kingdom. Several cases have recently abolished this distinction: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (discussed in *Chitty* at paras. 29-045–29-046); *Pankhania v The London Borough of Hackney* [2002] EWHC 2441 (Ch); *Brennan v Bolt Burdon* [2004] 1 WLR 1240 (QB).

The *Brennan* court noted that:

> at common law a mistake of law did not vitiate a contract. A mistake of fact in some circumstances could vitiate the contract. The difficulty was in distinguishing between a mistake of law and a mistake of fact. In order to grant relief "mistakes of law" were sometimes described as "mistakes of fact" ([2004] 1 WLR 1251, para. 45)
>
> . . .
>
> In my judgment the courts should be very slow to set aside and declare compromise agreements void on the ground of alleged common mistakes of fact or law. Before declaring a compromise agreement void the court must be satisfied that the mistake, in this case of law, was both common and fundamental to the making of the compromise agreement . . . (id. at 1252, para. 50)

Hong Kong has also eliminated the distinction between mistake in fact and mistake in law in relation to payments. See 18 *Halsbury's* at para. 115. 443. The *BLIS Glossary* translates *mistake of fact* as 事實方面的錯誤 and *LexisNexis* translates *mistake of law* as 法律錯誤.

42. *Chui and Roebuck* at para. 5.4.3 defines this term as where: 'one party only has made a mistake, but a mistake of which the other knows or, on an objective test, ought to know'.

Chitty at para. 5-067 has noted: 'No contract can be formed if there is no correspondence between the offer and the acceptance, or if the agreement is not sufficiently certain. . . . If, however, one party claims that he did not intend to contract at all, or did not intend to contract on the terms which the other party claims were agreed, then the question is whether, there is a contract (or, as it is often put, whether or not the "contract is void"). The intention of the parties is, as a general rule, to be construed objectively.'

For further detailed discussions, see *Fisher and Greenwood* at 248; *Butterworths* at 114–19.

43. *Chui and Roebuck* at para. 5.4.3. For other examples of successful claims of unilateral mistake, see, e.g., *Hartog v Colin and Shields* [1939] 3 All ER 566. (The seller mistakenly quoted the selling price as per pound rather than per piece. The buyer accepted the lower per pound price. The court held that the buyer could not claim a contract as the parties had negotiated the price on the per piece basis which was the trade standard and the buyer should have known of the mistake.) Or, see *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502. (The seller mistakenly listed $3,900 product for sale at $66;

the buyer claimed not to know of this mistake. The court found, based upon the number of orders placed and the time of placing the orders, the buyer had knowledge of the mistake.)

44. 18 *Halsbury's* at para. 115.102 explains: 'A mistake as to the terms of the offer must be carefully distinguished from a mistake as to the quality of what is being offered. A mistake as to the terms which are being offered raises problems of offer and acceptance; but a mistake as to the quality of what is being offered usually does not. . . . it is well-established that a mistaken motive of one party cannot prevent the formation of an agreement, even if realised by the other party.'

45. *Furmston* at 294 provides that: 'In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject matter of their contract has already perished.'

    Fisher and Greenwood at 248 states that: 'Common mistake arises when the parties are in agreement, but that agreement assumes some fact to be true when it is not.'

    For additional detailed discussions, see *Chui and Roebuck* at para. 5.4.1; *Butterworths* at 113, 116–17.

46. Along similar, but not identical, lines to the consequences of common mistake is section 8 of the Sale of Goods Ordinance (Cap 26) which provides that: 'Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void.'

47. *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679, 703 (para. 76).

48. *Bell v Lever Bros* [1932] AC 161, 218.

49. Id. at 224.

50. The impact of this case upon Hong Kong is unclear although there is a suggestion that Hong Kong courts would follow this narrowing of the application of common mistake. *Fisher and Greenwood* at 246, 254–58. See also *Chitty* at paras. 5-036, 5-060–5-061 for a discussion of this case, and id. at paras. 5-057–5-063 for a discussion of the impact of this case upon the application of equity to common mistake.

51. There is divergence among the authorities as to the terminology. *Chitty* at para. 5-001, note 3 states: 'earlier editions of this work used the phrase "mutual mistake", following the terminology used by Lord Atkin in *Bell v Lever Bros* [1932] A.C. 161, and until recently some other works adhered to this usage . . . It is now more common to refer to this type of mistake as "common mistake" . . . One reason for using the phrase "common mistake" is to reduce the risk of confusion with what is termed here "mutual

misunderstanding" (where the parties are at cross-purposes as to the terms of the contract).'

Furmston at 294 states: 'In mutual mistake, the parties misunderstand each other and are at cross-purposes. A, for example, intends to offer his Toyota Prius car for sale, but B believes that the offer relates to the Toyota Aventis also owned by A.'

Fisher and Greenwood at 248 explains: 'Mutual mistake arises when the parties are at cross purposes; each misunderstanding the other.'

See *Butterworths* at 113–14.

52. *Chui and Roebuck* at para. 5.4.2.

53. *Furmston* at 294–95 notes in regard to mutual and unilateral mistakes:

> Where either mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and that therefore the transaction must necessarily be void.
> . . . If mutual mistake is pleaded, the judicial approach . . . is objective; the court, looking at the evidence from the standpoint of a reasonable third party, will decide whether any, and if so what, agreement must be taken to have been reached. If unilateral mistake is pleaded, the approach is subjective; the innocent party is allowed to show the effect upon *his* mind of the error in the hope of avoiding its consequences. (emphasis in original)

Fisher and Greenwood at 249 comments that: 'Unilateral and mutual mistakes are instances where the mistake *negatives* consent; the parties never reach agreement.' (emphasis in original)

54. *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013) 16 HKCFAR 336 (CFA), 345–46.

55. *Arjunan and Nabi Baksh* at lxxi translates *non est factum* as 否定簽訂合約. For a more detailed discussion of *non est factum*, see *Butterworths* at 119–20.

56. *Saunders v Anglia Building Society* [1971] AC 1004, 1017.

57. *Lee Tit Fan v Strong Base International Industrial Ltd* [2012] HKEC 512, para. 33. See also *Wing Hang Credit Ltd v Hui Chun Kit Benjamin* [2011] HKEC 1447.

58. *Pathak Ravi Dutt v Sanjeev Maheshwari* [2014] 3 HKLRD 597, 605–6.

59. As Nelson Enonchong notes: 'two requirements which must be satisfied for relief to be available on the ground of duress. There must be pressure which amounts to compulsion of the will of the complainant and the pressure must be one which the law does not regard as legitimate'. See *Duress, Undue Influence and Unconscionable Dealing* para. 2-002 (2nd edition, 2012) (citation omitted) [hereinafter *Enonchong*]. This guidance has been cited with approval as the applicable law in Hong Kong by the court in *Lau Ying Wai v Emperor Regency International* [2015] HKEC 53.

60. *Chui and Roebuck* at para. 5.6.1. As noted in 18 *Halsbury's* at para. 115.104:

> By duress is meant the compulsion under which a person acts through fear of personal suffering as from injury to the body or from confinement, actual or threatened. . . . There is no duress simply because a party has to enter into a contract by reason of statutory compulsion, or the fact that the other party is a monopoly supplier. Moreover, as a general rule, a threat of civil proceedings or bankruptcy proceedings does not amount to duress, whether there is good foundation for the proceedings or not; but it may do so if it is intended and calculated . . . to cause terror in the particular case. The question whether imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful.
>
> . . .
>
> A contract obtained by means of duress exercised by one party over the other is at very least voidable, and may perhaps be void; but if it is voluntarily acted upon by the party entitled to avoid, it will become binding on him. The duress must be actually existing at the time of the making of the contract; and the personal suffering . . . may be that of the husband or wife or near relative of the contracting party, but that of a stranger or a master is not sufficient.

See also *Butterworths* at 120–21, 124; *Yeung* at Chapter 9 ('Duress').

61. The concept of economic duress: 'amounts to recognising that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure'. *Chitty* at para. 7-015.

Fisher and Greenwood at 277 explains: 'Economic duress occurs where some unfair and unlawful economic pressure is placed on a party to a contract. While it may sometimes be difficult to distinguish between duress and legitimate, hard bargaining, the key elements of economic duress are "illegitimate pressure" and lack of a practical alternative.'

See *Butterworths* at 121–24.

62. *Occidental Worldwide Investment Corporation v Skibs AS/Avanti (The Sibeon v The Sibotre)* [1976] 1 Lloyd's Rep 293.

63. *Chui and Roebuck* at para. 5.6.2. These authors explain economic duress through a review of the following case:

> For example, in *North Ocean Shipping v. Hyundai Construction: The Atlantic Baron* [1979] QB 705, the builders of a ship were to be paid in US dollars. At the time the dollar was dropping, they told the buyers that unless they increased the payment by 10%, there would be no delivery on the due date. The builders knew that the buyers had many commitments and needed the ship. The court was satisfied that there was economic duress. The renegotiation was prompted

> by coercion by the builders, who twisted circumstances under their power. This is why most cases have so far been about renegotiations—because there it is clear that it is not merely market forces which are involved. As it happens, the buyers still lost their case. They paid a final instalment after delivery, and this was held to be affirmation after duress had ceased. (Id.)

64. *Atlas Express Ltd v Kafco Ltd* [1989] QB 833; *Chitty* at paras. 7-032–7-037. See also *Ho* at 407–14. As for the consequences of payments made under this situation, see *Burrows* at 10–11.

65. *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd* [2007] 3 HKLRD 439 (CA), 492.

66. *Lau Ying Wai v Emperor Regency International* [2015] HKEC 53, para. 13.

67. One source states that the doctrine of undue influence is equity's version of the common law's doctrine of duress. Undue influence relates to those circumstances where pressure of a more subtle nature than recognised by the doctrine of duress has been used to persuade a party to enter into a contract. *Fisher and Greenwood* at 277. See 44 *Halsbury's* at para. 340.150; *Chitty* at paras. 7-057–7-143; *Butterworths* at 125. The *BLIS Glossary* translates *unconscionable* as 不合情理 and *acted unconscionably* as 作出不合情理的作為.

68. The *BLIS Glossary* translates *undue influence* as 不當影響 and *equitable doctrine* as 衡平法則.

69. *Chitty* at para. 7-101 notes: 'A transaction entered into as the result of undue influence is voidable and not void. The right to rescind on the ground of undue influence may be lost either by express affirmation of the transaction by the victim, by estoppel or by delay amounting to proof of acquiescence. . . . to be of any value, the affirmation must take place after the influence has ceased . . . Lapse of time in itself does not seem to constitute a bar to relief, but it will provide evidence of acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the undue influence.'

70. 18 *Halsbury's* at para. 115.106 states in part:

> Undue influence may be defined . . . as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract. It will be established where the party seeking to set the transaction aside establishes four things: (1) the other party or another who induced the transaction had the capacity to influence the first party; (2) that influence was exercised; (3) the exercise of influence was undue; and (4) the exercise of influence induced the transaction.
>
> . . . the existence of a relationship of presumed special trust and confidence between the contracting parties (such as that of parent and child, guardian and ward, trustee and beneficiary, solicitor and client, doctor and patient, or priest and confessor, but not husband

> and wife) merely relieves the dependent party of the obligation to prove that he reposed special trust and confidence in the other party in relation to the impugned contractual transaction: There arises, instead, an irrebuttable presumption that such trust and confidence existed in relation to the conclusion of that transaction. It does not follow from the existence of a presumed relationship of special trust and confidence, however, that the impugned transaction was induced by undue influence. More is needed than the presumed relationship of special trust and confidence. In particular, the dependent party must show that the transaction inflicted on him 'a transaction which calls for explanation'. Where the relationship of special trust exists (either because it arises from a type of relationship in which such trust and confidence is irrebuttably presumed, or where in other situations it has been independently proven on the balance of probabilities) and the dependent party can point to a 'transaction which calls for explanation', then a court is entitled to infer that 'in the absence of a satisfactory explanation the transaction can only have been procured by undue influence'.
>
> It is not permissible to infer merely from the fact that a transaction is manifestly disadvantageous to a party that he has entered into it as a result of undue influence.

71. For a discussion of these relationships, see, e.g., *Fisher and Greenwood* at 293–311; *Ho* at 418–26; *Chitty* at paras. 7-073–7-129; *Furmston* at 398–408; *Enonchong* at Chapter 14 ('Abuse of Confidence'). The *BLIS Glossary* translates *fiduciary relationship* as 受信關係. As for the consequences of payments made under this situation, see *Burrows* at 11–12; *Yeung* at Chapter 10 ('Undue Influence').

72. *Enonchong* at Part IV—Third Party Duress, Undue Influence or Unconscionable Dealing.

73. 18 *Halsbury's* at para. 115.106 states in part: 'A court should not be too quick to find either that a wife reposed special trust or confidence in her husband (in the sense that she entrusted him with management of her financial affairs) or that a transaction that turned out to be disadvantageous to her was one calling for explanation. Although a husband is not presumed to exercise special influence over his wife, the reality is that a married couple's interests are intertwined in ways that those of, say, solicitor and client or medical advisor and patient are not. The Court of Appeal has observed that courts in Hong Kong will exercise a similar reticence concerning transactions among close family members more generally.'

74. *Diners Club International v Ng Chi-sing*, unreported, (1986) CA 143/85, 72, affirmed on appeal [1986] HKEC 113 (CA).

75. *Chui and Roebuck* at para. 5.7. This term is identically defined both in section 2 of the Securities and Futures (Client Securities) Rules (Cap 571H) and in section 2 of the Securities and Futures (Client Money) Rules (Cap 571I):

'"unconscionable" (不合情理), in relation to a standing authority, means unconscionable having regard to the factors specified in section 6 of the Unconscionable Contracts Ordinance (Cap 458), as if the standing authority in question were a contract under that Ordinance.'

Section 6(1) of the Unconscionable Contracts Ordinance (Cap 458) provides the criteria for finding an unconscionable agreement:

> In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things)–
>
> (a) the relative strengths of the bargaining positions of the consumer and the other party;
>
> (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

See also *Butterworths* at 125–26; *Enonchong* at paras. 15-003–15-004.

76. *Chitty* at para. 7-133. For further explanation on the topic of 'unconscionable bargains', see *Burrows* at 79–82, and *Yeung* at Chapter 11 ('Unconscionability').

77. 44 *Halsbury's* at para. 340.151. *Chow Ki Chuen v Choi Lin Fung Ada* [2014] HKEC 200, para. 64 applied these three indicia.

78. *LZX and WYL* [2012] 5 HKLRD 29, 44–45 (citations omitted).

79. *Tong Kwok Cheong and Tong Wai Lin* [2014] 1 HKLRD 339 (CA), 351–52 (citation omitted).

80. Section 5(1) of the Unconscionable Contracts Ordinance provides:

> If, with respect to a contract . . . in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may–
>
> (a) refuse to enforce the contract;
>
> (b) enforce the remainder of the contract without the unconscionable part;

(c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

Section 6(1) of the of the Unconscionable Contracts Ordinance sets out the parameters to be considered by the courts in a claim of an unconscionable contract. Section 6(1) is set out in note 75. These two ordinances have been discussed in relation to exclusion clauses in Chapter 4, section C.

81. 18 *Halsbury's* at para. 115.207.

82. Id. at para. 115.246: 'The general rule is that a contract involving the commission of a legal wrong or a contract with an unlawful purpose may be not enforced by either party at law or in equity.'

Id. at para. 115.210: 'An agreement to do that which is a crime or a tort is illegal and will not be enforced by the courts.'

> Judges, in deciding the outcome of illegality cases, often draw a distinction between contracts which are illegal as *formed* and those illegal as *performed*. Thus, for example, a contract to jointly to rob a bank and then divide the proceeds is obviously illegal as formed. On the other hand a contract under which A agrees to ship B's goods is not, on the face of it, illegal but may be performed illegally if A decides to overload the ship contrary to law.
>
> Generally, when contracts are illegal as formed, the courts refuse to allow enforcement by either party. However, they may allow limited enforcement of an illegally formed contract via the "severance" of the part that is illegal.
>
> When, however, the contract is illegally performed, the courts tend to permit enforcement by an "innocent" party (i.e. one who has not performed illegally) but not by the guilty. On rare occasions, even the guilty party may be allowed to enforce the contract if his action can be asserted without reference to the illegality of the contract.

Fisher and Greenwood at 324.

83. For other examples of contracts to commit a crime or tort, see, e.g., 18 *Halsbury's* at paras. 115.210–115.211; *Chui and Roebuck* at paras 10.5.1–10.5.6; *Fisher and Greenwood* at 324–28.

84. *Chan Yau v Chan Calvin* [2014] 5 HKLRD 304, 323.

85. Id. at 325.

86. *Tang Teng Hong Tso v Cheung Tin Wah* [2014] 2 HKLRD 1032, 1038–39 [hereinafter *Tang Teng Hong Tso*].

87. *Chui and Roebuck* at para. 10.6: 'Contracts may be void because they are against public policy even though not illegal. The courts, while disapproving of them, do not regard them with the same severity as those which are strictly illegal.' The authors continue by noting: 'If merely one clause is void as against public policy, that clause may be severed, that is cut out, leaving the contract to stand without it . . . Collateral contracts will be valid as long as

they do not owe their existence only to the void part of the contract.' Id. at para. 10.6.2. For a more detailed discussion, see *Ho* at 480–512.

88. 18 *Halsbury's* at para. 115.213.
89. *Chitty* at para. 16-001.
90. Id. at para. 16-003.
91. Id. at para. 16-004.
92. Id. at para. 16-005.
93. *Best Sheen Development Ltd v Official Receiver* [2001] 1 HKLRD 866, 873.
94. Id. at 874 (citation omitted).
95. *Tang Teng Hong Tso* at 1039 (citation omitted).
96. *Ryder Industries Ltd v Chan Shui Woo* [2014] HKEC 1566, para. 22 (citation omitted).

Chapter 6

1. 18 *Halsbury's* at para. 115.290. It is beyond the purview of this book to examine in depth each of these grounds for discharging a contract. Only the most common grounds will be presented in general.
2. Id. at para. 115.291 states in part:

> The basic rule is that a promisor must perform exactly what he undertook to do; and the question whether what has been done amounts to exact performance is a question in each case of the construction of the terms of the contract . . .
>
> In all cases, however, the requirement of exact performance is qualified by the *de minimis* rule, that is that minute and unimportant deviations from exact compliance will be ignored.

3. *Chitty* at para. 21-028. In similar, but more detailed, language is 18 *Halsbury's* at para. 115.292.
4. *Chitty* at para. 21-001. See *Ho* at 622–24.
5. *Chitty* at para. 21-033.
6. *Chui and Roebuck* at para. 6.2.1.
7. Id.
8. Id. at para. 6.2.2.
9. *Chitty* at para. 21-031. See *Ho* at 622.
10. *Variation of a contract* refers to changes or amendments made to an existing contract and is discussed below in section B. See, e.g., *Chitty* at paras. 3-076–3-080; 22-032–22-039.
11. 18 *Halsbury's* at para. 115.293.
12. *Chui and Roebuck* at para. 6.2.3.
13. See *Chitty* at para. 22-001; *Ho* at 637–41.

14. *Chui and Roebuck* at para. 6.3.
15. Id.
16. 18 *Halsbury's* at paras. 115.399; 115.403. The *BLIS Glossary* translates *assign a contract* as 轉讓合約.
17. *Chitty* at para. 19-077. See also *Chui and Roebuck* at para. 9.4.2.
18. 18 *Halsbury's* at para. 115.143.
19. Id. at para. 115.144.
20. Id. at para. 115.398. The *BLIS Glossary* translates *novation* as 約務更替.
21. 18 *Halsbury's* at para. 115.399. For a more detailed discussion, see id. at paras. 115.399–115.403.
22. 18 *Halsbury's* at para. 115.399.
23. Id.
24. *Chitty* at para. 22-025 notes the distinction between rescission and repudiation:

> Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement . . . A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly, a contract which has been fully performed by one party can be rescinded provided that the other party returns the performance which it has received and in turn is released from its own obligation to perform under the contract. The consideration for the discharge in each case is found in the abandonment by each party of its right to performance or its right to damages, as the case may be. A rescission of this nature must be distinguished from a repudiation by one party, which the other party may elect to treat as a discharge of the obligation, and from the right to rescind which is given to one party in cases of fraud, misrepresentation, duress and undue influence. . . .

   The *BLIS Glossary* translates *rescind the contract* as 撤銷合約, *rescission* as 撤銷, *repudiate the contract* as 悔約, and *repudiation of the contract* as 不履行……合約.
25. 18 *Halsbury's* at para.115.364.
26. *Chui and Roebuck* at paras. 6.5–6.5.1. See also 18 *Halsbury's* at paras. 115.364–115.372 for a more detailed analysis of the intricacies of repudiation. In particular, note the *proviso* of para. 115.365: 'Not every refusal to perform a part of the contract amounts to a repudiation which entitles the other party to treat the contract as at an end; there must be a refusal to perform something which goes to the root or essence of the contract.'
27. *Chui and Roebuck* at paras. 6.5–6.5.2.
28. *Fisher and Greenwood* at 226.

29. The *BLIS Glossary* translates *frustration of contracts* as 合約受挫失效. For a more detailed discussion of the subject, see *Butterworths* at 129–36.
30. *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729.
31. *Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia* [1964] 2 QB 226, 238.
32. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL), 700.
33. *Chui and Roebuck* at para. 6.6.1.
34. 18 *Halsbury's* at para. 115.272.
35. Id. at para. 115.270 notes: 'The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party. The defence of frustration can therefore be defeated by proof of fault . . . Deliberate choice either not to perform or to put performance out of one's power will certainly be fault within this rule.'

    Chitty at para. 23-061 states: 'The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.' Thus, a contracting party cannot rely on 'self-induced frustration, that is, on frustration due to his own conduct or to the conduct of those for whom he is responsible'. Although the concept of self-induced frustration is clearly established as a matter of general principle, the precise limits of the doctrine have not been clearly established. It is merely a 'label' which has been used to describe: 'those situations where one party has been held by the Courts not to be entitled to treat himself as discharged from his contractual obligations'. Thus frustration has been held to be 'self-induced' where the alleged frustrating event was caused by a breach or anticipatory breach of contract by the party claiming that the contract has been frustrated (citations omitted).
36. In this regard, 18 *Halsbury's* at para. 115.274 notes: 'Whatever the alleged source of frustration, a contract is not discharged under the doctrine of subsequent impossibility and frustration merely because it turns out to be difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of rises or falls in price, depreciation of currency or unexpected obstacles to the execution of the contract, for these are ordinary risks of business. In particular, a party's insolvency or inability to get finance will not discharge him, unless, of course, the parties have agreed otherwise.'
37. The topic of breach and the remedies available therefore have already been introduced to the reader in the context of topics discussed elsewhere in this work, i.e., anticipatory breach, breach of condition, breach of warranty, fundamental breach, repudiation, and rescission. Discussion of these topics will not be repeated in this section.

Chapter 7

1. 18 *Halsbury's* at para. 115.378. The remedies mentioned in the latter portion of the quotation will not be presented in this work. However, they are mentioned so the reader is made aware that remedies other than those presented in this chapter might be available to an innocent party. For a more comprehensive

analysis of *damages*, see Harvey McGregor, *McGregor on Damages* (19th edition, 2014 and Supplement 1, 2015) [hereinafter *McGregor*].

2. *Chui and Roebuck* at para. 7.3.2: 'The usual purpose of an award of damages is to compensate the plaintiff for the loss caused by the breach. The object of damages is to put the injured party, so far as money can, into the same position as if the contract had been performed.' See generally *Ho* at Chapter 19 ('Remedies'). See also *Chitty* at para. 26-001; 44 *Halsbury's* at paras. 340.155–340.174.

3. *Richly Bright International Ltd v De Monsa Investments Ltd* [2015] HKEC 827 (CFA), paras. 15, 42 (citation omitted) [hereinafter *Richly Bright*].

4. But see *Attorney General v Blake* [2001] 1 AC 268, a court decision concerning the publication of the memoirs of a former British espionage agent contrary to the Official Secrets Act 1989. As damages, the Attorney General claimed the monies paid and to be paid to Blake by the publisher of his memoirs. This claim arose because Blake owed the government a duty not to profit from his former position as a Secret Intelligence Service member. There were two problems for the Attorney General to overcome. The first was that the Crown had suffered no loss as a result of the publication. The second obstacle was that English law at the time did not permit damages for breach of contract to be calculated by the financial benefits gained by the contract-breaker. The court overcame these problems by deciding that damages for breach of contract could be assessed by reference to the benefits gained by the wrongdoer rather than the loss suffered by the innocent party. The impact of the *Blake* case is analysed in 2003 *New LJ* 153.7079 (723); 2003 *Emp. Law & Lit*. 8.7 (33).

5. *Chitty* at para. 26-104: 'The term "remoteness of damage" refers to the legal test used to decide which types of loss caused by the breach of contract may be compensated by an award of damages.'

   The test is: 'A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach.' Id. at para. 26-108.

   See also 44 *Halsbury's* at paras. 340.285–340.291. See *Richly Bright* at paras. 24–41 for further analysis of this topic.

6. *Chui and Roebuck* at para. 7.3.3: 'The defendant does not have to pay damages for loss which was not caused by the breach.'

   Chitty at para. 26-057: 'Although the issue of remoteness—whether a particular loss was within the reasonable contemplation of the parties—tends to the prominent one in cases of liability for damage in the law of contract, before any issue of remoteness can arise causation must first be proved: there must be a causal connection between the defendant's breach of contract and the claimant's loss. The claimant may recover damages for a loss only where the breach of contract was the "effective" or "dominant" cause of that loss.'

   See also *Butterworths* at 142–45; 44 *Halsbury's* at para. 340.288.

7. *Hadley v Baxendale* (1854) 9 Ex 341, 355.

8. *Chitty* at para. 26-077. See also *Butterworths* at 145–46.
9. *Mega Yield International Holdings v Fonfair Co Ltd* [2014] HKEC 1546 (CA), para. 28 (citations omitted).
10. For a more detailed discussion, see *Butterworths* at Part VII ('Remedies'); *Ho* at Chapter 19 ('Remedies').
11. For a more detailed discussion, see, e.g., 44 *Halsbury's* at paras. 340.246–340.248. See *McGregor* at paras. 4-002–4-036.
12. 44 *Halsbury's* at paras. 340.251–340.256. See also *McGregor* at paras. 4-036–4-048.
13. 44 *Halsbury's* at paras. 340.257–340.259. See also *Burrows* at 5–6, 25–29; *McGregor* at paras. 14-001–14-004, and 14-021–14-043.
14. 44 *Halsbury's* at paras. 340.249–340.250. See also *McGregor* at paras. 12-001–12-011.
15. *Chitty* at para. 26-042.
16. Id. at paras. 20-043–26-044.
17. See *Ho* at 746–60. The term *liquidated damages* is where the damages have been agreed and fixed by the parties. The term *unliquidated damages* is where the damages are to be assessed by a court. See *Chitty* at para. 26-007; 44 *Halsbury's* at paras. 340.240–340.242.
18. As noted by *Chitty* at para. 26-171: 'Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). The clause is enforceable if it does not exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question.'
19. For a more detailed discussion, see, e.g., 44 *Halsbury's* at paras. 340.299–340.307.
20. *Dunlop Pneumatic Tyre Co v New Garage Co* [1915] AC 79, 86–88. See also *McGregor* at paras. 15-009–15-052.
21. *Elsley v J G Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1, 15.
22. *Black's Law Dictionary* at 1297 defines *equitable remedy* as 'a nonmonetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury'. See also *Butterworths* at 148–49.
23. As for the inadequacy of monetary compensation resulting in the remedy of specific performance, *Chitty* at para. 27-005 notes: 'The historical foundation of the equitable jurisdiction to order specific performance of a contract is that the claimant cannot obtain a sufficient remedy by the common law judgment for damages. Hence the traditional view was that specific performance would not be ordered where damages were an "adequate" remedy.'

24. 44 *Halsbury's* at para. 340.028 (p. 529).
25. See, e.g., id. at paras. 340.022, 340.028 (p. 530).
26. *Chui and Roebuck* at para. 7.4.1; *Chitty* at para. 27-034; 44 *Halsbury's* at para. 340.028 (pp. 527–28).
27. *Chui and Roebuck* at para. 7.4.1; 44 *Halsbury's* at para. 340.028 (p. 527). "Mutuality" means that specific performance will not be awarded *to* a party if it cannot be awarded *against* that party. *Fisher and Greenwood* at 141n34 (emphasis in original).
28. *Chitty* at para. 27-026. See also *Chui and Roebuck* at para. 7.4.1.
29. *Chitty* at para. 27-042.
30. *Chui and Roebuck* at para. 7.4.1; 44 *Halsbury's* at para. 340.022. See also *Chitty* at paras. 27-021–27-024.
31. *Chitty* at paras. 27-030–27-031. See also 44 *Halsbury's* at para. 340.022.
32. See, e.g., *Chui and Roebuck* at paras. 8.1–8.2.1. See also *Chitty* at paras. 26-182–26-192.
33. See, e.g., *Chui and Roebuck* at paras. 8.2.3–8.2.4; 44 *Halsbury's* at para. 340.305; *Chitty* at paras. 26-193–26-198.
34. See Chapter 4, section C.
35. See, e.g., *Chui and Roebuck* at paras. 8.11.1–8.11.2.
36. Id. at para. 8.11.1.

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