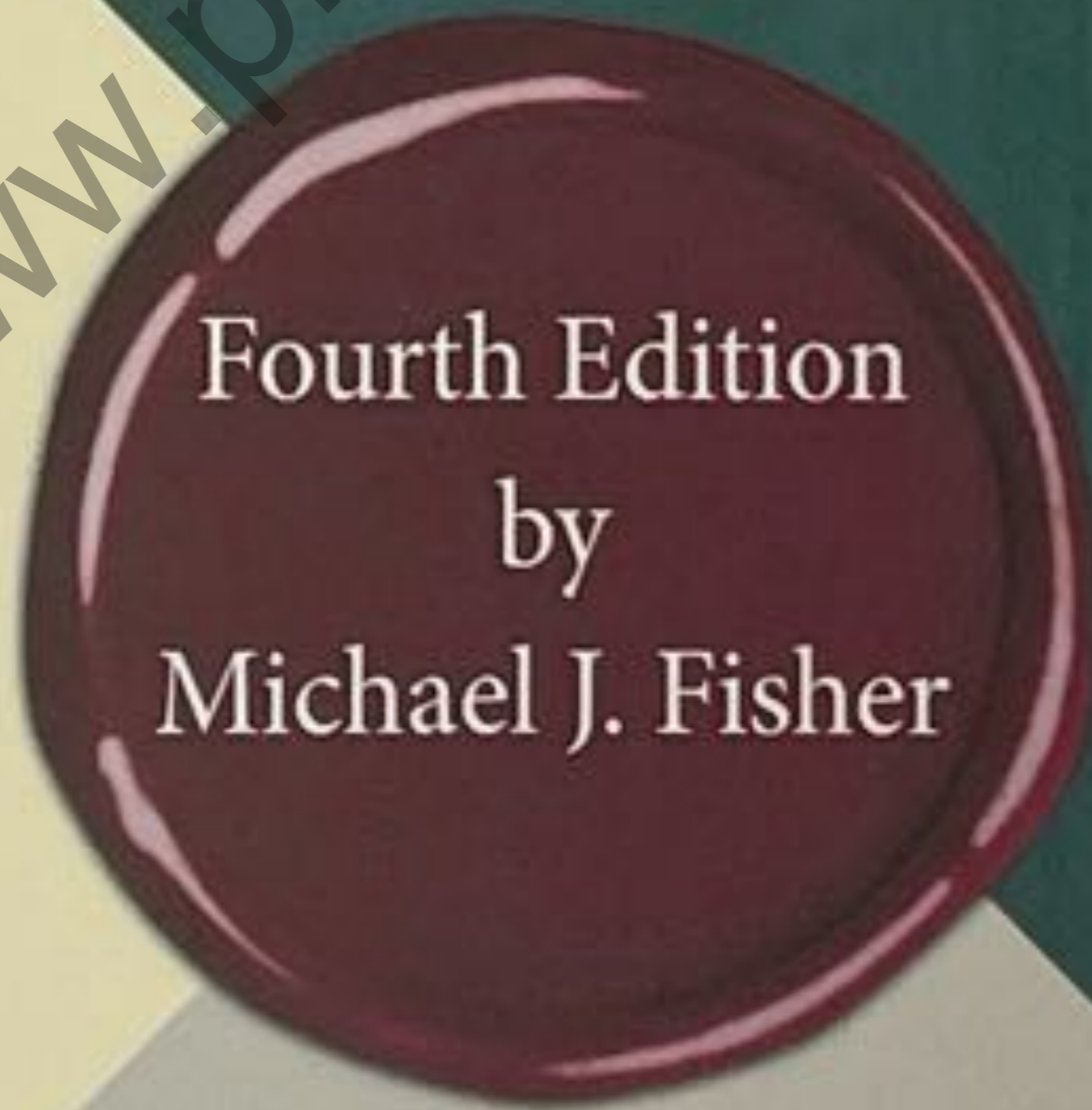


# CONTRACT LAW in Hong Kong

Michael J. Fisher and  
Desmond G. Greenwood



Fourth Edition  
by  
Michael J. Fisher

ert  
the  
services  
management  
ired Fifty-One  
quired under the terms  
s notice by signing both copies  
eturn the other to ITMS Logistics

2001  
Michael R. Vargae

the construction of concrete perimeter fence with  
latching shed, steel gate, guard post, watch tower  
crete drainage at Camp Agender, Mercedes,  
you as the Bidder with the Lowest Calculated  
Equivalent to Fourteen Million Seventeen  
the Centaves  
from the receipt of the Notice of Award.  
the Performance Security in the  
minutes. Failure to enter into the  
minutes a sufficient ground for

# Contents

Preface	ix
Table of Cases	xii
Table of Legislation	xxix
<b>Chapter 1. The Nature of Contract Law in Hong Kong</b>	<b>1</b>
OVERVIEW	1
1.1 What Contract Is	3
1.2 The Function of Contract Law	9
1.3 Is Hong Kong's Contract Law "Special"?	24
<b>Chapter 2. Sources of Hong Kong Contract Law</b>	<b>27</b>
OVERVIEW	27
2.1 Hong Kong Contract Law before 1997	28
2.2 The Effect of the "Handover" and the Basic Law: Hong Kong's Present System	32
2.3 The Declaratory Theory of Judicial Precedent	40
2.4 The Continuing Influence of English Law in Practice	42
<b>Chapter 3. Agreement</b>	<b>44</b>
OVERVIEW	44
3.1 The Significance of Agreement	45
3.2 The Requirement of Offer and Acceptance	45
3.3 Offer Distinguished from Invitation to Treat	47
3.4 The Nature of Acceptance	58
3.5 Communication of Acceptance	64
3.6 Acceptance in Ignorance of the Offer	72
3.7 Termination of Offer	74
3.8 Certainty of Agreement	78
3.9 The "Objective" Test of Agreement	88

Hong Kong University Press  
The University of Hong Kong  
Pok Fu Lam Road  
Hong Kong  
<https://hkupress.hku.hk>

© 2007 Michael J. Fisher and Desmond G. Greenwood  
© 2024 Fourth Edition Michael J. Fisher

ISBN 978-988-8842-81-0 (*Hardback*)  
ISBN 978-988-8842-78-0 (*Paperback*)

All rights reserved. No portion of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without prior permission in writing from the publisher.

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

**Chapter 4. Consideration**

## OVERVIEW

- 4.1 The Nature of Consideration
- 4.2 Past Consideration
- 4.3 Consideration Must Move from the Promisee
- 4.4 Sufficiency of Consideration
- 4.5 Performance of Existing Duty
- 4.6 Part-payment of a Debt
- 4.7 Promissory Estoppel
- 4.8 The Need for the Promissory Estoppel Doctrine
- 4.9 Do We Still Need Consideration?

**Chapter 5. Intention to Create Legal Relations**

## OVERVIEW

- 5.1 Is Intention Necessary?
- 5.2 Domestic and Social Arrangements
- 5.3 Commercial Arrangements

**Chapter 6. Contractual Capacity**

## OVERVIEW

- 6.1 Drunkenness and Mental Incapacity
- 6.2 Corporations
- 6.3 Minors (Infants)

**Chapter 7. Formality**

## OVERVIEW

- 7.1 The General Rule
- 7.2 Contracts Required to Be under Seal
- 7.3 Contracts in Writing or Evidenced in Writing

**Chapter 8. Contractual Terms**

## OVERVIEW

- 8.1 Representations and Terms
- 8.2 Written Contracts: The Parol Evidence Rule
- 8.3 The "Meaning" of Express Terms
- 8.4 Implied Terms
- 8.5 Classification of Terms: Conditions, Warranties, and Innominate Terms
- 8.6 Exemption Clauses

## Contents

<b>Chapter 9. Misrepresentation</b>	231
OVERVIEW	231
9.1 The Scope of Misrepresentation	233
9.2 Rescission for Misrepresentation	246
9.3 Damages for Misrepresentation	252
9.4 Contributory Negligence	263
9.5 Exemption of Liability for Misrepresentation	264
<b>Chapter 10. Mistake</b>	268
OVERVIEW	268
10.1 Is a Doctrine of Mistake Necessary?	270
10.2 Types of Mistake	271
10.3 Common Mistake	272
10.4 Mutual Mistake	282
10.5 Unilateral Mistake	284
10.6 Rectification of Written Documents	291
10.7 <i>Non Est Factum</i>	296
10.8 Proposals for Reform	299
<b>Chapter 11. Duress and Undue Influence</b>	302
OVERVIEW	302
11.1 Duress	305
11.2 Undue Influence	317
<b>Chapter 12. Unconscionability</b>	340
OVERVIEW	340
12.1 Statutory Unconscionability in Hong Kong	341
12.2 Unconscionability at Common Law	347
<b>Chapter 13. Illegal Contracts</b>	352
OVERVIEW	352
13.1 Types of Illegal Contracts	354
13.2 Gambling Contracts	357
13.3 The Effects of Illegality	359
13.4 Contracts in Restraint of Trade	373
<b>Chapter 14. Termination of Contract</b>	390
OVERVIEW	390
14.1 Termination by Agreement	392
14.2 Termination by Performance	393

- 14.3 Termination via Breach
- 14.4 Termination by Frustration

## Chapter 15. Remedies for Breach of Contract

### OVERVIEW

- 15.1 Damages
- 15.2 Equitable Remedies
- 15.3 Limitation of Actions

## Chapter 16. Privity of Contract

### OVERVIEW

- 16.1 The Doctrine of Privity of Contract
- 16.2 Third Party Benefits
- 16.3 Third Party Burdens
- 16.4 The Relationship with Consideration
- 16.5 Legislative Reform

Appendix 1: Glossary of Terms

Appendix 2: Important Contract Legislation: English and Hong Kong  
Equivalents

Appendix 3: Limitation Periods: English and Hong Kong Equivalents

Bibliography

Index

## Preface

When Desmond Greenwood and I produced the first edition of this book, in 2007, we noted that it was the first comprehensive student text on this subject for over 10 years. Fifteen years later, with the publication of this fourth edition, it remains one of very few textbooks focused on Hong Kong contract law at the undergraduate or graduate level.

Much has changed in the Hong Kong legal arena since 2007. Many of those changes directly affect contract law; others do so more tangentially. Hong Kong's first post-1997 Chief Justice, Andrew Li, who did so much to maintain Hong Kong's judicial independence and autonomy, has gone but his legacy is an important one. By making consistent use of the facility, provided for in the Basic Law, to invite overseas judges to sit in the Court of Final Appeal (CFA), Chief Justice Li helped to ensure that Hong Kong's appellate judges are constantly exposed to influences from elsewhere in the common law world. Nor is "traffic" all one way, as Hong Kong is gradually being recognised as a "source" of common law wisdom, as well as its recipient. This is vital for the development of Hong Kong's jurisprudence and will, over time, ensure that Hong Kong's law (including its contract law) will develop a flavour of its own. Exposure to external common law sources is crucial at a time of increasing "localisation" of the judiciary and the increasing use of Cantonese in the courts. While there is much to welcome in this development, it poses the risk of insularity, as Chief Justice Li so wisely observed. It is to be further welcomed that under Andrew Li's successor, Geoffrey Ma CJ, exposure to "external" common law judicial influence has continued, despite some hostility from the so-called "loyalist" camp for whom judicial autonomy is an anathema. Time will tell whether Ma CJ's successor, Andrew Cheung, will continue to encourage the crucial exposure to "external" common law sources. It is a matter of regret that this exposure to other common law experience is now under threat, with the resignation of some overseas CFA judges and the prospect of more.

Not all changes, to put it mildly, have been for the better and, while the use of Chinese suggests increased "access" to law for Hong Kong's citizens, this is significantly countered by increased legal costs which put litigation out of the reach of

## Contractual Capacity

### OVERVIEW

The general rule is that any person has the capacity to make a contract. Exceptions exist in relation to mental patients, drunkards, corporations, and minors. Of these, only the last two are significant and the rules on corporations are more suitably dealt with in the context of company law.

The law on minors, previously referred to as infants, is now similar in England and Hong Kong, having once been rather different. The Infants Relief Act 1874 which incorporated rules not enacted in Hong Kong, has now been abolished and similar common law and statutory rules are now found in both jurisdictions.

Three categories of contracts made with minors are recognised: enforceable contracts, voidable contracts and "other contracts". Before proceeding, it should be stressed that all three categories are enforceable *by* the minor,<sup>1</sup> the common law and statutory rules exist to protect the minor, *not* the adult who contracts with him.

"Enforceable"<sup>2</sup> contracts comprise contracts for necessary goods and services, and beneficial contracts of employment or service. When dealing with "necessaries" it should be remembered that this includes far more than the basic necessities of life. Any item necessary to maintain a particular minor in the "station of life in which he moves"<sup>3</sup> is within the definition. Thus, although courts might identify some items as "mere luxuries", incapable of being necessary, the usual question will be one of fact; is this item necessary for this particular minor? Those dealing with minors will, therefore, be at a disadvantage since no general definition exists; what may be necessary for a rich undergraduate may not be necessary for a poor, unemployed minor.

1. Though a minor cannot be granted specific performance, under the principle of "mutuality", since it cannot be awarded against him; see final paragraph of 6.3.1.2.
2. Although these contracts are described as "enforceable", the minor can only be required to pay a reasonable price for necessaries rather than the contract price. Specific performance can never be awarded against a minor.
3. Per Baron Parke in *Peters v Fleming* (1840) 6 M&W 42 at 46-47.

Further, even the rich minor will not be liable where he is already well supplied with goods of the type for which he has contracted.

The minor's liability to pay for necessaries may be seen as being not strictly contractual at all, but "quasi-contractual", since liability is not to pay the agreed contract price but to pay a "reasonable" price. Further, it appears that the minor has to pay not because he has promised to do so but because he has received a benefit. Thus the minor is not liable to pay for necessary goods which he has ordered but delivery of which he has refused to accept. There is some authority for the proposition that necessary services must be paid for, having been requested, even though the minor subsequently refuses the services.

Contracts of service or employment are enforceable against a minor if they are substantially for his benefit. Of course, contracts may contain a mixture of terms, some favouring the minor and others not. The test is whether the contract is beneficial overall.

Voidable contracts comprise a variety of agreements which have little in common except that they confer a permanent, or at least long-standing, interest. Thus, contracts for the purchase of shares, partnership contracts and contracts for a lease are all voidable. The effect of voidability is that the minor may cancel, or repudiate, these agreements at any time during his minority or within a reasonable time after attaining majority. When the minor has repudiated he has no further liabilities under the contract. However, obligations which accrued before repudiation may have to be honoured.<sup>4</sup>

All "other contracts" are unenforceable against the minor though, again, the minor may enforce them. Within this category are minors' trading contracts and loans to minors. Both English and Hong Kong law now permit the possibility of the minor acknowledging or "ratifying" such contracts after reaching majority. Where ratification occurs the contract becomes enforceable against the minor.

The minor's immunity from liability for most types of contract does not extend to tort, where minors are generally liable. This might, potentially, provide an alternative form of action for the adult dealing with a minor. However, the courts have made clear that a tort action will not be permitted against a minor which would, in effect, amount to enforcing an otherwise unenforceable contract; the minor's tort liability will, therefore, only arise when he does an act outside the contemplation of the contract.<sup>5</sup>

The above rules indicate that the adult dealing with the minor is often in a disadvantageous position. Equity gave some relief to the adult by permitting the "restitution" of property obtained by the minor by fraud (for example, falsely purporting to be an adult, acquiring non-necessary goods and refusing subsequently to pay for

4. There is considerable uncertainty here since the decided cases are not consistent on whether the minor's repudiation affects prior obligations.
5. See *Ballett v Mingay* [1943] KB 281.

them). The equitable remedy was limited, however, since it required evidence of wrongdoing by the minor and probably did not apply where the precise goods or money obtained could not be identified. Legislation has improved the adult's position considerably since proof of fraud is no longer required and courts now have a much wider discretion as to what may be "restored".<sup>6</sup>

The prudent adult may also protect himself by requiring that the minor's liability be "guaranteed"<sup>7</sup> by an adult at the time of making the contract. Hong Kong law has always recognised the enforceability of such guarantees and English law has adopted the same position via legislation.<sup>8</sup>

### 6.1 Drunkenness and Mental Incapacity

Generally, the law gives some protection to those who make contracts while drunk (or drugged) or suffering from such mental incapacity that they do not understand what they are doing. The contract is "voidable" so that the affected party may rescind the contract *provided that* it can be proved that the other party was aware of the affected party's incapacity. This "awareness" requirement is implicit in the alleged undue influence case involving *Lei Shing Hong credit*, discussed in chapter 12.<sup>9</sup> More emphatically, in cases where an order under the Mental Health Ordinance<sup>10</sup> has been made, the affected party's contractual capacity is formally ended and undertaken by others acting on his behalf.

Even where a contract is rescinded by the affected party on the grounds of the incapacity described there is a requirement to pay a "reasonable" amount for any "necessary" goods or services supplied under the contract. This is the same principle as that which applies to minors and the definition of "necessaries" and its significance will be dealt with below.<sup>11</sup>

### 6.2 Corporations

A corporation is a legal "person", capable, in law, of making contracts in the same way as an individual, subject to minor limitation. A corporation may be a

6. Minors' Contracts Act 1987 s 3, enacted in Hong Kong by the Age of Majority (Related Provisions) Ordinance (Cap 410) s 4.

7. Since a guarantee is an undertaking of secondary liability, it is arguable that, in the case of "absolutely void" agreements under the old Infants' Relief Act 1874, the adult was not a "guarantor" but an "indemnifier". The distinction is only important (in England) in terms of "formality" because guarantees must be evidenced in writing. This formal requirement no longer applies in Hong Kong (see chapter 7).

8. Minors' Contracts Act 1987 s 2.

9. See *Lei Shing Hong Credit Ltd v San Tong Lee Co Ltd & Others* [2021] 2 HKC 572 discussed at 11.2.3.1.

10. Cap 136, ss 11–13.

11. See 6.3.

corporation "sole" or corporation "aggregate". The former consists of one person only at any time, maintaining the same corporate identity where that person is succeeded by another as a result, for example, of resignation or death. The Archbishop of Canterbury would be a corporation sole.

A corporation aggregate consists of many individuals at any one time but has a single, separate, corporate identity. While the individuals in the corporation may change, its corporate identity remains the same.

Corporations may take various forms but by far the most common is the registered company. Companies are relevant to the issue of contractual capacity because, traditionally, they were required to have a Memorandum and Articles of Association, the former setting out the "objects" of the company. A company may engage in contractual activities only if they fall within its "objects clause". Attempts to engage in other activities may be challenged on the basis that they are *ultra vires* and exceed the company's legal capacity to contract. In theory, at least, this seems to represent a considerable restriction on a company's contractual capacity. In practice, companies tend to draw up rather vague objects clauses or, alternatively, very lengthy, all-embracing clauses, such that the *ultra vires* doctrine is less significant than might first appear. Under the new Companies Ordinance,<sup>12</sup> indeed, companies are no longer required to state their "objects".<sup>13</sup> If they do so state, however, a shareholder is entitled to restrain *ultra vires* activities via an injunction. However, any other party dealing with the *ultra vires* company in good faith (which is presumed) is entitled to enforce the *ultra vires* contract.

A detailed study of this area is not appropriate in a work on contract law and those wishing to look at this topic in more depth should consult a work on Hong Kong company law or business associations.<sup>14</sup>

### 6.3 Minors (Infants)

The most important area to consider in relation to contractual capacity is that concerning what used to be called "infants" but are now more often described as "minors". Minors are those who are under 18 years of age.<sup>15</sup> The law seeks to protect them from the consequences of making imprudent contracts as a result of their immaturity. As a result, the law recognises that some contracts, for "necessaries", should be enforceable against the minor, while others will be valid unless and until rescinded by the minor. A final category of contracts cannot be enforced against the minor unless he "ratifies" them on reaching the age of majority. This considerable

12. Cap 622. In force 3 March 2014.

13. Section 67 entirely abolishes the requirement of a memorandum of association.

14. See, for example, V. Stott, *Hong Kong Company Law* (Hong Kong: Pearson, 14th edn, 2015); S Lo & C Qu, *Law of Companies in Hong Kong* (Hong Kong: Sweet & Maxwell, 2nd edn, 2013).

15. Age of Majority (Related Provisions) Ordinance (Cap 410) s 2 (Hong Kong); Family Law Reform Act 1969 s 1 (England).

protection of the minor is subject only to limited amelioration for the adult via the doctrine of restitution, initially introduced by equity but subsequently put on a statutory footing.

Since the law on this subject is intended to protect only the minor, contracts are always enforceable *against* the adult who deals with a minor.<sup>16</sup>

### 6.3.1 "Enforceable" Contracts

The law recognises two categories of contracts enforceable against a minor: contracts for necessary goods or services, and beneficial contracts of service or employment. While these contracts are described as "enforceable" against the minor, this is only in the sense that the adult has a right to compensation should the minor default; the minor can never be compelled by the court to complete his side of the bargain.<sup>17</sup>

#### 6.3.1.1 Contracts for Necessaries

In order to protect minors from the consequences of their inexperience, the common law held that they were liable to pay for necessary goods<sup>18</sup> and services but not for luxuries. Traditionally the question of whether an item was necessary was a question for judge and jury. A judge could decide that an item was a "mere luxury" and this determined the point. If the item was not so classified, it was for a jury to decide whether the item was necessary for the particular minor involved. This depended on his individual circumstances: his resources, his job requirements etc.

It has been suggested that a jury would be more likely than a judge to find an item "necessary".<sup>19</sup> It also depended on whether the minor was already sufficiently supplied with the item in question.<sup>20</sup> The common law rules for determining necessities still remain, although the involvement of juries in such civil matters has long been abolished.

The minor is liable to pay only a "reasonable price" for necessities. This supports the view that his liability is not contractual but "quasi-contractual". The concept of quasi-contract is rather complex and elusive but, in this context, refers to the proposition that a minor's liability, unlike that of an adult, is based not on his promise to pay but on an obligation to pay a reasonable amount in return for a

16. Even under the Infants' Relief Act 1874, which described certain contracts as "absolutely void", courts took the view that the minor could enforce the contract.

17. That is, specific performance (see 15.2) is never available *against* a minor.

18. A statutory definition of necessary goods was introduced, in England, by the Sale of Goods Act 1893 s 2 and, in Hong Kong, by the Sale of Goods Ordinance (Cap 26) s 4(2).

19. "Much difficulty was caused in the nineteenth century by the tendency of juries (consisting of 12 shopkeepers) to stretch the definition of necessities beyond its legitimate limits." Treitel (op cit) at p 6

20. *C* [1908] 2 KB 1 discussed below.

benefit received.<sup>21</sup> This proposition is supported by the statutory rule that the minor is required to pay only a reasonable price and only for goods necessary at the time of sale *and delivery*. Section 4 of Hong Kong's Sale of Goods Ordinance<sup>22</sup> states that:

where necessaries are sold and delivered to an infant or minor . . . he must pay a reasonable price therefor.

In this section, "necessaries" means goods suitable to the condition in life of such infant or minor . . . and to his actual requirements at the time of the sale and delivery.

If this proposition is correct it means that a minor is not liable to pay for necessities which he has ordered but of which he refuses to take delivery.

The wording of section 4 follows section 3 of the (English) Sale of Goods Act 1979, which itself repeats section 2 of the Sale of Goods Act 1893. The definition was applied in the following well-known case.

#### *Nash v Inman*<sup>23</sup>

The plaintiff was a tailor, the defendant a wealthy undergraduate minor. The plaintiff sold and delivered to the defendant a quantity of clothes including 11 fancy waistcoats. The defendant refused to pay for the goods, pleading "infancy". On receiving proof of the defendant's age and evidence that he was already well supplied with clothes, the judge held there was no issue to go to a jury and that the defendant was clearly not liable to pay. The plaintiff's appeal to the Court of appeal was unanimously rejected.

Cozens-Hardy MR, delivering the leading judgment, stated:

The defendant pleads infancy at the date of the sale, and his plea is proved. What is the consequence of that? The consequence of that is that the Infants' Relief Act, 1874, becomes applicable . . . It is not sufficient, in my view, for (the plaintiff) to say, "I have discharged the onus which rests upon me if I simply shew [*sic*] that the goods supplied were suitable to the condition in life of the infant at the time". There is another branch of the definition which cannot be disregarded. Having shewn that the goods were suitable to the condition in life of the infant, he must then go on to shew that they were suitable to his actual requirements at the time of the sale *and delivery*.<sup>24</sup>

Following the *Nash* approach, the adult supplier of goods to a minor appears to be at a considerable disadvantage. If he makes a contract to deliver goods to a minor he may find that, at the time for delivery, the minor refuses to accept them, or is already well supplied, and is not obliged to pay. However, if the adult, on discovering

21. Such liability is described as "*re*" rather than "*consensu*".

22. Cap 26.

23. [1908] 2 KB 1.

24. Emphasis added.

the incapacity of the minor, decides against delivery, he may be sued for breach of contract since the incapacity rules protect the minor but not the adult! It will be difficult for the adult to know if the minor is already well supplied unless he has had previous dealings with him. Indeed, where the adult is unaware of the minor's minority he will not even have cause to enquire whether he is already well-supplied.

In reality, the position of the adult is less hazardous than it appears, since, following the reduction of the age of majority, in England and Hong Kong, from 21 to 18,<sup>25</sup> few adults deliver goods on credit to minors and, once the minor has paid, he generally has no right to recover his payment. The adult may also protect himself by requiring that an adult guarantee the minor's payment. Such a guarantee is enforceable both in English and Hong Kong law.<sup>26</sup>

The view expressed in the *Nash* case that a minor has only to pay for a benefit actually received is supported by the fact that there is no case in which a minor has been held liable on an "executory" promise to pay for goods, "necessary" or otherwise. There is, however, some authority that a minor may be liable on an executory promise for necessary services.

#### *Roberts v Gray*<sup>27</sup>

The plaintiff was a leading billiards player. The defendant, a minor, made a contract with the plaintiff by which he was to accompany him on an 18 months' world tour for which the plaintiff was to pay but be reimbursed from the tour profits. Following a dispute about the balls to be used, the defendant repudiated the contract before the tour commenced. The plaintiff claimed damages for loss of expenses already incurred. His action succeeded before a unanimous Court of Appeal.

Cozens-Hardy MR seemed content to treat this executory promise as different from one to pay for goods and concluded:

If, therefore, this is a contract falling within a class to which the doctrine of necessities applies, and if, taken as a whole, it is for the infant's benefit, I see no foundation whatever for the argument that the infant is not liable for damages in the event of his repudiating or declining to perform the contract entered into.

To treat a promise to pay for necessary services differently from one to pay for necessary goods is difficult to justify and it is perhaps significant that Cozens-Hardy MR and his fellow judges, while referring to "necessaries", based their decision largely on a case involving beneficial contracts of service,<sup>28</sup> the second category of contracts enforceable against minors.

<sup>25</sup> In England by the Family Law Reform Act 1969 s 1; in Hong Kong by the Age of Majority (Related Provisions) Ordinance (Cap 410) s 2.

<sup>26</sup> In England by the Minors' Contracts Act 1987 s 2; in Hong Kong by the Age of Majority (Related Provisions) Ordinance (Cap 410) s 3.

<sup>27</sup> (1890) 45 Ch D 430.

<sup>28</sup> *London & North Western Railway Co* [1894] 2 QB 482.

#### 6.3.1.2 Beneficial Contracts of Service or Employment

The common law took the view that contracts of employment or service could be enforced against a minor provided they were substantially for his benefit. It would be in the interest of minors to encourage adults to make such contracts by upholding them. "Trading" contracts, on the other hand, would not be upheld since these were potentially dangerous for minors. When the age of majority was 21, there were many situations in which minors made, often lengthy, contracts of apprenticeship. Even today there are numerous examples of young performers who make contracts involving large financial sums and then regret them if a better offer later arises. The enforceability of such agreements depends, as it always has, on whether the agreement is, overall, for the minor's benefit. An emphatically non-beneficial contract is illustrated by the case of *De Francesco v Barnum*,<sup>29</sup> where the plaintiff had engaged a minor as an apprentice dancer under very restrictive conditions. The minor was to be entirely at the disposal of the plaintiff; she was to receive poor payment; she would receive no pay unless employed by the plaintiff who had no obligation to employ her; she could be dismissed at the will of the plaintiff and could accept no alternative employment without his consent. The defendant wished to engage the minor and the plaintiff sued him for inducing breach of contract. The action failed since it was held that the apprenticeship was clearly not beneficial to the minor and was therefore unenforceable against her. On this basis, it was determined that the defendant could not be liable for inducing the minor to break a contract which she was legally entitled to break. Perhaps curiously this proposition was challenged in the much later case of *Proform Sports Management Ltd v Proactive Sports Management Ltd and Another*,<sup>30</sup> involving the footballer, Wayne Rooney. Rooney had signed a contract with the claimants when only 15 and without legal advice. The court felt no need to determine whether the contract was substantially beneficial to Rooney since the trial judge, Judge Hodge QC, felt the case was not analogous to a contract of employment or apprenticeship and was therefore automatically voidable at Rooney's option. The judge distinguished cases of employment or apprenticeship where the contract gave the minor the opportunity to work. In Rooney's case, the minor was already working (as an Everton footballer) when making his contract with the claimants. Essentially, their input was to attend to Rooney's image and marketability. Having decided that the Rooney-Proform contract was voidable, the judge went on to confirm the *De Francesco* view that there can be no liability for inducing the breach of a voidable contract.

Given the oppressive nature of the contract in the *De Francesco* case, it was not difficult for the court to determine that the minor was not bound by it and that the defendant was entitled to offer the minor an alternative arrangement without

<sup>29</sup> (1890) 45 Ch D 430.

<sup>30</sup> [2006] EWHC 2812.

being penalised. Other cases are less clear cut and involve the court weighing the beneficial and detrimental aspects of the agreement to determine whether, overall, it was in the minor's interest when the contract was made. In *Clements v London and North Western Railway*<sup>31</sup> the plaintiff, a minor, was employed by the defendants as a railway porter and joined their insurance scheme. Under this scheme, the plaintiff would be paid compensation for injury at work arising in various ways but agreed to give up rights under the Employers' Liability Act 1880. The statute provided for higher amounts of compensation but they were payable in a smaller variety of situations than the insurance scheme. The plaintiff was injured at work and made a claim under statute, arguing that he was not bound by the scheme since it was not for his benefit. The Court of Appeal unanimously rejected the plaintiff's claim, holding that the insurance scheme was substantially for his benefit.

In summing up the view of the court, Kay LJ stated:

I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract.

A more complex discussion of the meaning of "beneficial" emerges from the following case.

### *Chaplin v Leslie Frewin (Publishers) Ltd*<sup>32</sup>

The plaintiff, while a minor, made a contract with the defendants to write a book about his life. The defendants were attracted by the fact that, although the plaintiff was the son of a very rich and world-famous actor, he lived a "Bohemian" lifestyle and was unemployed. The plaintiff subsequently regretted the decision to write for the defendants and attempted to repudiate the contract after the book was largely prepared. The Court of Appeal, by a two to one majority, refused his claim to repudiate; holding that the agreement was, when made, substantially for the plaintiff's benefit.

The majority view was that, when made, the agreement was beneficial to the minor since it allowed him to be paid for a work that was "worthless from a literary point of view" and "vulgar trash".<sup>33</sup> Lord Denning MR, dissenting, adopted a broader approach to the concept of "benefit". He said:

I cannot think that a contract is for the benefit of a young man if it is to be a means of purveying scandalous information . . . It is not for his good that he should exploit his discreditable conduct for money, no matter how much he is paid for it.<sup>34</sup>

31. [1894] 2 QB 482.  
32. [1966] 1 Ch 71, [1966] 2 WLR 40.  
33. Per Denning LJ.  
34. [1966] 1 Ch 71 at 50.

Lord Denning did, however, add that the disclosures involved could result in a libel action, which would of course be disadvantageous, and Danckwerts LJ himself expressed the view that parts of the book contained blasphemies which could, theoretically, have led to criminal prosecution.

Finally, it should be remembered that whether or not the contract of service or employment is regarded as "enforceable", the only remedy for breach remains damages; specific performance is never awarded against a minor.<sup>35</sup> Applying the equitable principle of mutuality,<sup>36</sup> the minor is, correspondingly, not eligible for an award of specific performance.

### 6.3.2 Voidable Contracts

The category of "voidable" contracts comprises four types of contract: contracts concerning land; contracts of partnership; contracts to buy shares and marriage settlement contracts.

The effect of voidability is that the contract is binding upon the minor unless and until he repudiates it. Repudiation must be during minority or within a reasonable period after reaching majority. Once a minor repudiates he can incur no future liabilities under the contract. However, any money already paid by the minor is irrecoverable. The law is uncertain as to whether those liabilities already incurred before repudiation but not yet discharged must be met by the minor.

The following is the leading case on voidable contracts.

### *Steinberg v Scala (Leeds) Ltd*<sup>37</sup>

The plaintiff, while still a minor, applied for shares in the defendants' company. The shares were allotted to her and she paid the first instalment. Eighteen months later, she repudiated the contract and claimed back the money she had paid. Her action for repayment failed in the Court of Appeal since, although she had received no dividends, the shares had been of value and recovery of money paid was only possible in the case of a total failure of consideration.

Younger LJ stated:

the authorities appear to me to establish that where something has been made available for the infant under the contract in the period during which she has not sought to avoid it moneys paid cannot be recovered back, although on the subsequent repudiation of the contract by the infant all liability in respect of further payments disappears.<sup>38</sup>

35. Specific performance of a personal service contract is, in any event, almost unknown (see 15.2).  
36. "Mutuality" means that specific performance will not be awarded to a party if it cannot be awarded against him.  
37. [1923] 2 Ch 452.  
38. *Ibid* at 463.

The category of voidable contracts is a strange one since there seems to be no obvious justification for treating these contracts differently from other contracts unenforceable against the minor. The usual justification, that these contracts confer a permanent or long-standing interest, is not entirely convincing. Treitel<sup>39</sup> states:

There seems to be no satisfactory explanation for the existence of this separate class of voidable contracts. It provides perhaps the clearest illustration of the dilemma in which the law sometimes finds itself when it tries at the same time to protect minors and not to cause undue hardship to adults who deal with them. But this dilemma exists in all cases of contracts with minors and scarcely justifies special treatment of the four voidable contracts. Perhaps this is based on social and economic factors which have long since passed away.

### 6.3.3 "Other Contracts"

All contracts which are neither "enforceable" nor "voidable" are unenforceable against the minor although, again, the minor may enforce them against the adult. Within the "other contracts" category are included minors' trading contracts and loans to a minor. Where the loan is for the purpose of buying necessaries, and the money is actually so spent, the lender has the same rights as the unpaid seller of necessaries (that is, to the reasonable price of the necessaries bought) under the equitable doctrine of "subrogation". In the case of this category of contracts the minor may "ratify" them on reaching majority,<sup>40</sup> in which case they become enforceable against him.

It should be noted that these contracts are merely unenforceable against the minor, rather than "void". Hence, where the minor has performed the contract he will be unable to recover back money paid or goods transferred under it since the contract under which performance was rendered was a valid one.

### 6.3.4 Minors' Liability in Tort

Although minors are generally not liable for breach of contract, there is no such immunity in tort. The potential would exist, therefore, to circumvent a minor's immunity in contract by suing him in tort over what is really a contractual issue. To prevent this, the courts have held that a minor cannot be sued in tort if the true effect of the action would be to enforce an otherwise unenforceable contract. If the minor is to be sued in tort he must have done something outside the contemplation

39. Treitel (op cit) at p 648.

40. English law first permitted, then abolished ratification. The statute which abolished ratification, the Infants' Relief Act 1874, has itself been abolished and the possibility of ratification is, therefore, restored. Hong Kong never introduced the Infants' Relief Act, so ratification has always been possible.

of the contract so that any action would be genuinely tortious. So, for example, it has been held that a minor who hired a non-necessary horse and rode it too hard could not be liable in tort since, in reality, the minor had merely broken an unenforceable contract.<sup>41</sup> Conversely, in *Ballett v Mingay*,<sup>42</sup> the defendant, a minor, paid to hire valuable electrical equipment from the plaintiff. Subsequently the plaintiff asked for the return of the equipment but the defendant was unable to comply since he had lent it to a third party. The plaintiff's action, in the tort of detinue,<sup>43</sup> succeeded before a unanimous Court of Appeal.

Lord Greene MR made clear that the contract of hire contemplated that the minor would not part with the goods. He said:

From the evidence it seems that, properly construed, the terms of the bailment of these articles to the defendant did not permit him to part with their possession at all . . . On that basis, there is a remedy against the defendant in tort, because the circumstances in which the goods passed from his possession and ultimately disappeared were outside the purview of the contract of bailment altogether.

The dividing line between a tort action which is regarded as properly contractual and one which is genuinely tortious is a narrow one. In *Ballett v Mingay* the deciding factor was probably the valuable nature of the property hired; it might be expected that one would lend out a bicycle to a friend but not expensive electrical equipment.

Under the principle that a tort action may not be used to enforce an otherwise unenforceable contract against a minor, it is not permitted to sue, in the tort of deceit, a minor who induces an unenforceable contract by pretending to be an adult.<sup>44</sup>

### 6.3.5 Restitution in Equity

In order to give some relief to the adult who dealt with a dishonest minor, equity permitted the remedy of restitution of property obtained by fraud. This had two important limitations: that it only applied where the minor had acted fraudulently, and that it perhaps only applied where the precise goods obtained could be identified. Thus, if fraudulently obtained goods were sold, the adult might be unable to recover the money paid for them. Similarly, where money was obtained by fraud, it might be impossible to obtain restitution unless the precise coins or notes could be identified. The position can be better understood by comparing the cases of *Stocks v Wilson*<sup>45</sup>

41. *Jennings v Rundall* (1799) 8 TR 335. However, a minor was held liable in tort in *Burnard v Haggis* (1863) 14 CB (NS) 45, where he hired a horse for riding and, contrary to the express terms of the contract, took it jumping.

42. [1943] KB 281.

43. This action, now abolished in England, was available where a party was unable to return the goods of another but did not question his title to them.

44. *R Leslie Ltd v Sheill* [1914] 3 KB 607.

45. [1913] 2 KB 235.

and *R Leslie v Sheill*.<sup>46</sup> In *Stocks*, a minor obtained goods by fraudulently pretending to be an adult. He was ordered to restore the value of the goods thus obtained. In the *Leslie* case, a minor obtained £400 in cash from the plaintiff moneylenders by again, falsely purporting to be an adult. The plaintiffs' subsequent action to recover the money failed. The cases are hard to reconcile, though Goff and Jones<sup>47</sup> attempt to do so. They write:

*Stocks* . . . is reconcilable with *R Leslie v Sheill*. The basis of the latter decision is, we suggest, the rule of policy that personal remedies in restitution are not to be employed indirectly to enforce contracts which are at law not binding on the minor. This rule of policy overrides the equity whereby a minor would otherwise have to pay for goods obtained by fraud or to repay money obtained fraudulently under a contract of loan. Where a minor has obtained property under a contract (other than a contract for the loan of money) induced by his fraud, he will be compelled in equity to restore (it or) . . . refund the proceeds. Here the rule of policy does not bar recovery. But the minor is under no liability to pay the contract price for the property . . . because to do so would indirectly enforce the contract. Similarly if he has obtained the money under a contract of loan, he will not be liable to repay it.<sup>48</sup>

The distinction is a fine one, based on the premise that "restitution ends where repayment begins". Arguably, in such cases, restitution of money would be possible in the unlikely event that the precise notes or coins lent could be identified. The limitations of equitable restitution are unlikely to be of more than academic interest since the adult now has a preferable option, created by statute, described in the next section.

### 6.3.6 Statutory Restitution

The statutory rules on restitution by a minor, in Hong Kong, are to be found in the Age of Majority (Related Provisions) Ordinance.<sup>49</sup> Section 4 states:

- (1) Where—
  - (a) a person ("the applicant") has after the commencement of this Ordinance entered into a contract with another ("the respondent"); and
  - (b) the contract is unenforceable against the respondent, or he repudiates it because he was a minor when the contract was made,
 the court may, if it is just and equitable to do so, and on such terms as it may think fit, require the respondent to transfer to the applicant any property acquired by the respondent under the contract, or any property representing it.
- (2) This section shall not prejudice any other remedy available to the applicant.

46. [1914] 3 KB 607.

47. R. Goff and G. H. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 4th edn, 1993).

48. *Ibid* at p 537.

49. Cap 410.

This section reproduces section 3(1) of the (English) Minors' Contracts Act 1987. Although the section preserves existing remedies, including equitable restitution, it is clearly more advantageous to the adult. Under the statutory rules, restitution is at the discretion of the court, as with the equitable principle, but there is no need to establish fraud. So, for example, the minor in a *Nash v Inman*<sup>50</sup> situation could be made to return the non-necessary waistcoats he has acquired from the adult under the unenforceable contract, even though no fraud is involved. Further, the minor can be required to transfer property "representing" the property acquired under the contract so that the equitable problem, of identifying the precise property acquired, does not arise under the statutory rules. Where the *Nash v Inman* minor has sold the waistcoats he can, at the court's discretion, be required to transfer the money received.

50. Discussed at 6.3.1.1 above.

## Formality

### OVERVIEW

The general rule, in Hong Kong and England, is that contracts can be made in any form. Despite a common misapprehension on the part of the layman, there is no general requirement that contracts be made in writing (though reducing a contract to writing assists the question of proof in cases of dispute). Contracts may, generally, be made entirely orally or even, in exceptional cases, by conduct.

However, there are many important exceptions to the general rule on formality, some of which are of great significance. First, some agreements are required to be made by deed, notably those stipulated in the Powers of Attorney Ordinance (PAO).<sup>1</sup> Very importantly, in Hong Kong, a legal estate in land can be created, extinguished or disposed of only by deed: section 4(1) of the Conveyancing and Property Ordinance (CPO).<sup>2</sup>

Other types of contracts require particular formalities and these are contained in various statutory provisions. Some contracts must actually be “in writing” if they are to be enforced by one or both of the parties, notably various types of credit agreement.

Most important of all, in Hong Kong, the actual contract for the “sale or other disposition of land” must be evidenced in writing if it is to be enforceable at common law. The requirement of evidence in writing can be satisfied if there is a note or memorandum in writing containing all the essential terms and signed by “the party to be charged”.<sup>3</sup> The memorandum need not be in any particular document and can even be formed by joining together two or more documents provided they relate to each other.

1. Cap 31.

2. Cap 219.

3. That is, by the person against whom the agreement is to be enforced.

Under the doctrine of part performance, equity may intervene where there has been clear agreement and the parties have acted on this agreement but without sufficient written evidence. Examples of acts of part performance include taking possession of the property by the plaintiff with the consent of the defendant, alterations to the property or, exceptionally, payment of money. The doctrine of part performance continues to apply in Hong Kong, although it has been abolished in England.

The main reasons for requiring a particular form of contract are the need for certainty and the need to protect certain types of parties. The requirement that contracts concerning land have to be evidenced in writing dates back to the ancient Statute of Frauds, 1677, which was intended to protect those entering into important contracts by ensuring that they could not be sued on a contract unless they had signed the necessary written memorandum. However, the requirement of a “memorandum in writing” involves considerable complexity which could be simplified were Hong Kong to follow the English law lead for land transactions and substitute a requirement that the *contract itself* must be written.

Formal requirements may also exist for the rescission or variation of a contract but these will be covered in chapter 14.

### 7.1 The General Rule

The general rule, in Hong Kong and England, is that contracts can be in any form. They can be made under seal or wholly in writing or evidenced by writing or orally or evidenced by the conduct of the parties or in any combination of these methods. It is important to note that the perception of many laymen that an oral contract is not as valid as a written one is incorrect. The problem that may arise with oral contracts is that it will be more difficult to adduce cogent evidence when dealing with issues that arise from a breach of an oral contract rather than a written one.

There are important exceptions to the general rule and they are contained in legislation covering certain types of contracts. Hong Kong and England differ substantially in these legislative exceptions; this chapter examines mainly the Hong Kong position; focusing on the most important areas such as contracts relating to land, guarantees, bills of exchange and promissory notes.

When considering the question of form, it will be assumed that other elements necessary for the formation of a contract: offer, acceptance, consideration, intention to create legal relations, certainty, capacity (and lack of illegality) are present.

Treitel<sup>4</sup> lists several purposes for the requirement of form. The first is that it promotes certainty as it is usually easy to see if the required form has been used. Second, it may enable a person to have longer to consider his position. Third, by providing a written record of the terms of the contract, it acts to protect a weaker

4. Edwin Peel, *Treitel: The Law of Contract* (London: Sweet & Maxwell, 14th edn, 2015) at pp 205–206.

party. As a general observation, the more valuable the consideration required for a contract the greater the need for these purposes to be met. This is particularly true of contracts relating to land. Formal requirements are also more likely in respect of those contracts which, by their very nature, involve a likely inequality of bargaining power, such as hire-purchase agreements.

## 7.2 Contracts Required to Be under Seal

Contracts made under seal (deeds) are significant in the law of contract because they, alone, can be valid in the absence of consideration.<sup>5</sup> The most important example of a contract required to be made by deed is a "conveyance" of an interest in land.

### 7.2.1 Deeds

A deed is a written document that is signed, sealed and delivered.<sup>6</sup> The terms of a deed are called covenants. At common law, it was not necessary to sign and seal a deed; sealing was sufficient. However, signing is required by statute.<sup>7</sup> The process of sealing a document used to be a formal process but is now done by simply attaching red adhesive paper to the document. In practice, many commercial contracts are made under seal, though this is not formally required, in order to avoid the intricacies of the consideration requirement.

### 7.2.2 Types of Transactions That Require Sealing

The most important type of transaction here is a contract which also operates to convey land. Section 4(1) of the CPO states that:

A legal estate in land may be created, extinguished or disposed of only by deed.<sup>8</sup>

Section 2 of the CPO defines a legal estate to include leases, easements and mortgages which must, therefore, all be dealt with by deed. Not all leases of land, though, are subject to the requirement for a deed. Section 4(2)(d) exempts leases of three years or less from this requirement.

Another type of transaction which requires a deed is covered by section 2(1) of the PAO which states that:

An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power.

5. See chapter 4.

6. Although not all sealed documents are deeds, for instance a share certificate.

7. CPO s 19(1) and PAO s 3.

8. CPO s 4(2) contains a number of exceptions which are best covered in a land law text.

Section 4(2) of the PAO also requires that two other persons must be present as witnesses and attest the instrument.

Although the requirement has been abolished in England,<sup>9</sup> Hong Kong still requires that authority to execute a deed must in turn be granted by deed. An exception is made in the case of foreign companies which have been incorporated in states which do not require the document of authorisation to be under seal.<sup>10</sup>

Despite the simpler procedures today for signing and sealing a deed, the formalities are often overlooked. The CPO recognises this and sections 19, 20, 23, and 23A contain presumptions that act as saving provisions in the event that any oversights or lapses occur.

Additional sealing requirements, requiring the use of a company's "common seal" to effect transactions, have been relaxed under the new Companies Ordinance<sup>11</sup> which permits documents signed by one<sup>12</sup> or two directors (or one director and a company secretary)<sup>13</sup> to have the same effect as a deed effected via the company's common seal.<sup>14</sup>

### 7.2.2.1 The Effect of Non-compliance

Where there is a requirement for a deed the consequence of non-compliance is that the document is void at common law. As between the parties, however, the failure of a document to qualify as a deed may not render it entirely ineffective.

In respect of contracts concerning land, the law will readily construe an abortive attempt to grant the interest in property as an agreement to grant the interest in question. For example, if X purports to grant to Y a lease of land for five years but does so in writing rather than under seal, the transaction will be construed as an agreement by X to grant Y a lease of five years. Y can call on X to execute a deed granting a lease of five years. If necessary, this could be by way of an order for specific performance. Meanwhile, Y would hold in equity under an equitable lease for five years.<sup>15</sup>

A document that does not qualify as a power of attorney under PAO may still be a valid appointment of agency but such an agent would generally not be authorised to execute deeds on behalf of the principal.<sup>16</sup>

9. Section 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989.

10. Law Amendment and Reform Consolidation Ordinance (LARCO) (Cap 23) s 26.

11. Cap 622. In force from 3 March 2014.

12. Where the company has only one director.

13. Where there two or more directors.

14. Section 127(3). For fuller coverage of company law documentary requirements, the reader should consult a specialised company law text.

15. See, for example, *Parker v Taswell* (1858) 2 De G & J 559.

16. See Betty Ho, *Hong Kong Agency Law* (Hong Kong: Butterworths, 1991), p 24.

### 7.3 Contracts in Writing or Evidenced in Writing

There are numerous types of contract that must be *in writing* or *evidenced in writing*. The distinction is important since the requirement of evidence merely requires that there is a written memorandum of the important terms of the contract “signed by the party to be charged”. This memorandum need not have been specifically prepared as such and may consist of several “joined” documents. The requirement of “evidence in writing” originates in the old English Statute of Frauds, 1677, which listed a number of different types of contract. Of these, only guarantees, the rules for which no longer apply in Hong Kong, remain. However, the formal rules for the disposition of land, while reformed in England, remain in force in Hong Kong.

#### 7.3.1 Contracts Required to Be in Writing

Contracts which must be (wholly) in writing include, most importantly, bills of exchange and promissory notes. Very basically a bill of exchange is an order to a third party to pay the amount of the bill, while a promissory note is a promise to pay by the maker of the note. The Bills of Exchange Ordinance (BEO)<sup>17</sup> defines both of these instruments more fully<sup>18</sup> and enacts that not only must they be entirely in writing, they must also satisfy the statutory requirements.

A further (and increasingly important) example of an agreement which must be written is one to submit disputes to arbitration.<sup>19</sup>

##### 7.3.1.1 The Effect of Non-compliance

In the case of bills of exchange, the consequence of non-compliance with the requirement of writing and the “statutory requirements” is that the document becomes “non-negotiable”. Thus, a third party cannot be compelled to honour a defective bill of exchange and pay the amount of the bill. The deficient document may, however, be used as evidence of the debt of one party to the other.

In the case of an agreement to submit to arbitration, non-compliance with the formal requirement of writing will render the agreement unenforceable.

#### 7.3.2 Contracts Required to Be Evidenced in Writing

The requirement that a contract be evidenced in writing means that, unlike the need for a contract to be entirely in writing, all that is required is some written evidence of the contract. The main category of agreements required to be “evidenced in writing”

17. Cap 19.

18. Section 3(1) defines a bill of exchange and s 89(1) defines a promissory note.

19. Section 19 of the Arbitration Ordinance (Cap 609), adopting Article 7 of the UNCITRAL Model Law

are contracts for the sale or other disposition of land.<sup>20</sup> They are of great importance in Hong Kong, given the significance of land transactions here, and the law in Hong Kong differs substantially from that in England.

#### 7.3.2.1 Land Contracts

“Land” is not fully defined by CPO although section 2 explains that “land” includes “land covered by water”; “any estate, right, interest or easement in or over any land”; “the whole or part of an undivided share in land”; and “things attached to land or permanently fastened to anything attached to land”. As this definition is only partial, recourse may still be needed to the common law in determining the meaning of “land”. In *Chan Juen v Yu Fook Shung*,<sup>21</sup> it had to be decided whether an oral contract to allow the cultivation of ginger on the respondent’s land was a contract for the disposition of land. It was held that the contract was for “goods” not land, since cultivated produce “*fructus industriales*” are goods at common law. As such the oral agreement was enforceable without written formality.

##### 7.3.2.1.1 Sufficient Memorandum in Writing

In Hong Kong, under statute, contracts for the sale and disposition of land must be evidenced in writing if they are to be enforceable at common law.

Section 3(1) of the CPO states:

Subject to section 6(2), no action shall be brought upon a contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some note or memorandum thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose.

This requirement largely mirrors the now abolished English rules<sup>22</sup> on the requirement of a memorandum in writing if a contract concerning land is to be enforceable. Although the subsection talks of an interest in land, most disputes, in practice, focus on buildings on land. Given that there is a significant difference between a requirement that the agreement itself must be in writing and the need for a mere memorandum in writing, the heading of section 3—“Land contracts to be in writing”—is misleading and does not reflect its actual content.

20. It appears that the English law requirement that “guarantees” must be evidenced in writing was inadvertently abolished in Hong Kong (see Ho, n 16 above, p 87). This view was endorsed by Suffiad J in *Global Bridge Assets Ltd & Others v Sun Hung Kai Securities Ltd* [2009] 3 HKC 445, and although his judgment was overturned on appeal (unrep, CACV 161/2009, 24 February 2010), the Court of Appeal emphasised (at para 18) that no argument had been put to it on the guarantee/evidence in writing issue and that, therefore, it should not be taken to have considered the matter.

21. [1987] 3 HKC 539.

22. Statute of Frauds 1677.

The CPO does not specify what constitutes an effective note or memorandum. These requirements have developed via the common law cases. The main requirements are that the parties, the consideration, the subject matter and any special terms must be clearly identified *and* that the note or memorandum must be signed by "the party to be charged" or his authorised agent.<sup>23</sup> The Court of Final Appeal in *Kwan Siu Man Joshua v Yaacov Ozer*<sup>24</sup> held that the date of completion is an essential term of any contract for the sale and purchase of land in Hong Kong. Thus, in *Centaline Property Agency Ltd v Suen Wai Kwan (Samantha)*<sup>25</sup> the court held unenforceable an agreement where the alleged memorandum contained an amended completion date but no signature on same by the "party to be charged". Judge CB Chan cited with approval the words of Judge Lok, in a previous unreported case,<sup>26</sup> that:

As the Plaintiff had not initialled the amendment relating to the date for the execution of the formal agreement, it is common ground that there was no binding agreement between the Plaintiff and the Vendor relating to the sale of the property.<sup>27</sup>

The memorandum need not have been prepared as such and can even be formed by joining together two or more documents provided they relate to each other.<sup>28</sup> The memorandum must also be signed by the party *against whom* the contract is to be enforced (the "party to be charged") or by his authorised agent. This means that the memorandum does not need to be signed by both parties but that the party seeking to enforce the agreement must show that the *other party* or his authorised agent<sup>29</sup> has "signed"<sup>30</sup> the memorandum. The requirement of signing arises because of the importance of this type of contract. England has abolished the equivalent of this legislation<sup>31</sup> but most of the leading cases on what constitutes an effective memorandum in writing are English and are applicable to Hong Kong today.

23. Emphasised in *Kwok Chor Shan v Empire Properties Development Consultants Ltd* (unrep, DCCJ 14764/2000, 17 July 2003).

24. [1999] 1 HKC 150.

25. [2004] 4 HKC 294.

26. *Advanced Chemicals Ltd v Centaline Property Agency Ltd* (unrep, DCCJ 16630/2000, 31 August 2001).

27. *Ibid* at para 5. The generally crucial nature of the identification of the completion date was affirmed in *Kwok Chor Shan v Empire Properties Development Consultants Ltd*, cited above.

28. The leading English case on joinder of documents is *Timmins v Moreland Street Property Co Ltd* [1957] Ch 110.

29. Where land is sold by auction, the auctioneer has authority to sign on behalf of both parties.

30. The word "sign" has been liberally construed by the English courts (see, for example, *Leeman v Stocks* [1951] 1 All ER 1043). It is clear that both in England and Hong Kong, courts will now be called upon to recognise "electronic" signatures (see Electronic Transactions Ordinance (Cap 553) s 6(1)).

31. English law now requires the contract itself to be in writing: Law of Property (Miscellaneous Provisions) Act 1989 s 2.

The following Hong Kong case illustrates the factors a court must take into account in determining whether a sufficient memorandum in writing exists (albeit not in a single document).

### *Chan Yat v Fung Keong Rubber Manufactory Ltd*<sup>32</sup>

The parties had negotiated a draft lease. Following a subsequent dispute, the plaintiff sued and the defendants argued that there had never been any contract as there was no adequate memorandum. The plaintiff maintained that there were several documents which constituted such a note or memorandum. It was found, in the Hong Kong High Court, that there was an enforceable oral agreement of which there was a sufficient memorandum in writing. All the necessary terms were found to have been included: the parties, the consideration, the terms etc and that the necessary signature was present. With regard to the description of one of the parties as merely "landlord", the judge found this to be sufficient description as the identity of this party could be ascertained from the relevant register. Although the commencement date had been incorrectly stated, the judge found this to be sufficiently minor to be overlooked.

Having reviewed the precedents, Pickering J said:

it has long been settled that a plaintiff can rely on two or more documents to prove his case. At one period it was necessary that the one document should specifically and on its face refer to the other . . . but the severity of this attitude has since been relaxed . . . in *Pearce v Gardner*<sup>33</sup> an envelope and letter shown by the evidence to have been enclosed in the envelope, were allowed to form a joint memorandum. The modern position is that whilst oral evidence designed to introduce a second document to which no reference at all was made in the first is still excluded, nonetheless if without any express reference the language or form of the document signed by the defendant indicates another document as relevant to the contract oral evidence will be allowed to identify that second document.<sup>34</sup>

The Statute of Frauds, 1677, was the first piece of English legislation to require documentary evidence for dealings in land. This statute has been incorporated in Hong Kong law and its provisions relating to the grant and transfer of interests in land are now found, in an updated form, in sections 3, 5, 6, and 7 of the CPO. The approach of the courts to the legislation in this area of formality has always been dominated by the fact that it is intended to prevent fraudulent claims. Therefore, if a signed document does not contain all the required details for a sufficient memorandum, the temptation might be to supply these details in a separate document and claim the right to join the documents together to form one, complete memorandum.

32. [1967] HKLR 364.

33. [1897] 1 QB 688.

34. [1967] HKLR 364 at 384-385.

To prevent this, the courts have been restrictive in allowing joinder, permitting it only when the signed document relates to the unsigned one.

### 7.3.2.1.2 Intervention of Equity: The Doctrine of Part Performance

The "memorandum in writing" rules do produce certainty, but they might also produce unfairness. This will often be so when people conduct their affairs in ignorance of these rules. Few people outside (and not all those inside) a lawyer's office understand the detailed requirements of these rules. Defendants may seize on non-compliance with the legislation as a way out of genuine agreements. Equity has, therefore, intervened, where there has been a clear concluded agreement (albeit not evidenced in writing) and the parties have acted on this agreement, by virtue of the doctrine of *part performance*. Under this doctrine, where there have been acts consistent with the oral contract alleged to have been made, and for which the most likely explanation is that the alleged contract has, indeed, been made, the agreement will be "enforced" in equity.<sup>35</sup>

The doctrine of part performance has been abolished in England<sup>36</sup> but continues to apply in Hong Kong. Legislation acknowledging the role of the doctrine of part performance is contained in the CPO. Section 3 is headed "Land contracts to be in writing" but section 3(2) states:

This section applies to contracts or other dispositions and does not affect the law relating to part performance or sales by the court.

Equity has adopted the doctrine of part performance so that legislation aimed at preventing fraud, such as the Statute of Frauds 1677 and the CPO, should itself not be used as an instrument of fraud. Under the doctrine of part performance, where there is an alleged oral contract concerning land and there have been acts consistent with the alleged contracts, the most obvious explanation for which is that the contract alleged has, in fact, been concluded, equity will enforce the agreement by means of the equitable remedy of specific performance.<sup>37</sup> The remedy is granted where the claimant has acted in reliance on the oral contract and where, in the circumstances, it would be unjust to allow the other party to argue the contract is unenforceable because of the lack of formal written evidence.

The approach to part performance was once very strict, requiring that the acts must be "unequivocally referable" to the alleged contract.<sup>38</sup> This meant that if there were other explanations for the acts, even if unlikely, the requirement of

35. Provision exists for an award of damages where there is a sufficient act of part performance but specific performance (compelling performance) is inappropriate; see Law Amendment & Reform (Consolidation) Ordinance (Cap 23) s 13A.

36. By Law of Property (Miscellaneous Provisions) Act 1989 s 2.

37. In Hong Kong damages can be awarded where specific performance is not available, as a result of LARCO s 13A.

38. As stated in *Maddison v Alderson* (1883) 8 App Cas 467.

part performance would not have been met. This strict approach was relaxed in later cases including the definitive decision on part performance delivered by the House of Lords.

### *Steadman v Steadman*<sup>39</sup>

The parties were husband and wife. The wife left the husband and obtained an order for maintenance for herself and her child. Later, the wife wanted an order that the house be sold and the proceeds split; the husband, in arrears of maintenance, wanted a variation of the maintenance order. The parties met outside the court and orally agreed that the wife would sell her half share of the matrimonial home to her husband for £1,500 plus £100 of the maintenance arrears. This agreement was announced to the court. The husband paid the £100 and sent the draft deed of transfer to the wife for her to sign. She refused to sign. The husband brought an action for specific performance of the agreement which was upheld by a majority of four to one (Lord Morris dissenting) in the House of Lords. It was held that, while the transfer of money could not, in itself, be enough, taken together with the other circumstances there were sufficient acts of part performance to satisfy the court.

The judgment is authoritative but the judges in the majority used differing reasoning and the *ratio* is not clear. Lord Reid said that the fact that there is an explanation for the plaintiff's behaviour other than the existence of the contract will not be fatal. It is sufficient if it is the most likely explanation. However, he was not clear about whether the acts must unequivocally refer at least to *some* contract relating to land. This doubt was removed by the later decision in *Re Gonin*<sup>40</sup> which reasserted the requirement that the contract to which the acts refer must be one relating to land. The question of whether or not the payment of money could ever constitute an act of part performance was also raised, with the majority deciding that such payment could be an act of part performance when seen in the context of the surrounding circumstances.

Taking possession of a property by the plaintiff with the consent of the defendant is the most usual act of part performance.<sup>41</sup> Alteration to the property is another common example.<sup>42</sup> However, the Hong Kong courts have emphasised that the acts of part performance must prove the existence of an already *concluded* agreement and not merely the confident expectation that such an agreement would eventually be reached. It was in stressing this principle that the Court of Final Appeal was critical of the Court of Appeal's approach in *The World Food Fair Ltd & Another v*

39. [1974] 2 All ER 977. There is some irony in the fact that this area of Hong Kong law is still governed by an English decision overturned, in England, by legislation in 1989.

40. [1979] Ch 16.

41. *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169.

42. For instance, *Rawlinson v Ames* [1925] Ch 339.

*Hong Kong Island Development Ltd*,<sup>43</sup> a case more fully discussed in the context of “certainty”.<sup>44</sup> The CFA found that the Court of Appeal had applied “circular” logic in finding part performance<sup>45</sup> in acts which were consistent with the existence of a contract but not conclusive. Ribeiro PJ stated:

In regarding payment of the deposit and the giving of possession for fitting out works as “performance” which decisively proved the existence of a concluded contract, the Court of Appeal implicitly assumes that there existed a concluded contract of which such acts constituted “performance”, which “performance” is then relied on to prove the existence of that very contract.<sup>46</sup>

### 7.3.2.1.3 The Effect of Non-compliance

Where there is neither a sufficient memorandum in writing nor an adequate act of part performance, the agreement will be unenforceable rather than void. This means that, while no action may be brought on it, the contract is not void *ab initio*. Therefore, if money has already been paid under the unenforceable, but still valid contract, it cannot be recovered.<sup>47</sup>

## 7.3.3 Other Contracts

There are a number of other different types of contracts that are subject to specific writing requirements contained in legislation. Some of these are discussed below.

### 7.3.3.1 Money Lending Contracts

The Money Lenders Ordinance (MLO)<sup>48</sup> covers loans advanced by persons other than banks and other exempted companies licensed under the Banking Ordinance.<sup>49</sup> The MLO is aimed at protecting the public from the unscrupulous practices of “loan sharks”. It does this by imposing licensing requirements on all money lenders and placing ceilings on the interest rates they can charge. Section 18 of the MLO is headed “Form of agreement”. Section 18(1) requires that within seven days after the making of a money lending agreement, a note or memorandum in writing of the agreement be made in accordance with subsection (2) and signed personally by the borrower and a copy of such note or memorandum be given to the borrower

43. Court of Appeal decision [2005] 1 HKC 594. The CFA at (2006) 9 HKCFAR 735 appears to have adopted a rather more restrictive approach than the English judges in *Steadman*.

44. See chapter 3 at 3.8.

45. It was clear to the CFA that there was no sufficient “evidence in writing” so that enforceability required sufficient part performance.

46. Applied in *Lo Lee, Marilyn v Goel Arun Kumar* [2015] HKDC 1429.

47. *Thomas v Brown* (1876) 1 QB 714 at 723.

48. Cap 163.

49. Cap 155. It seems to have been assumed, over-optimistically, that banks would not resort to unscrupulous practices; but see 12.1.4.

at the time of signing. Also a summary of certain provisions of the MLO must be included or attached to such a copy. Section 18(2) lists the required contents of the note or memorandum including, *inter alia*, the names and addresses of the parties, the amount of principal, relevant dates, the form of security for the loan (if any) and the rate of interest charged.

This list of requirements leaves little area for dispute between the parties. However, should a claim be made that an agreement is unenforceable because of non-conformity with MLO, the court has a discretion, under section 18(3), to declare such an agreement enforceable. The subsection states:

Notwithstanding subsection (1), if the court before which the enforceability of any agreement or security comes in question is satisfied that in all the circumstances it would be inequitable that any such agreement or security which does not comply with this section should be held not to be enforceable, the court may order that such agreement or security is enforceable to such extent, and subject to such modifications or exceptions, as the court considers equitable.

### 7.3.3.2 Bills of Sale

The Bills of Sale Ordinance (BSO)<sup>50</sup> imposes certain formalities on a bill of sale. Like MLO (above), the BSO aims to protect individual borrowers. Section 2 of the BSO contains a wide definition of a bill of sale. A bill of sale includes any document of assurances of personal chattels, any document authorising the taking possession of certain chattels and any agreement by which a right in equity to any personal chattels, or to any charge or security thereon is conferred. Section 15 is headed “Form of bill of sale” and requires the bill of sale to be made in accordance with the statutory form<sup>51</sup> or else be void. Section 7 requires the bill to be attested and registered.

### 7.3.3.3 Marine Insurance Policies

The Marine Insurance Ordinance (MIO)<sup>52</sup> applies to all contracts which indemnify the insured against marine losses. Section 22 of the MIO requires such contracts to be in the form of a marine insurance policy that accords with the MIO. Sections 23–26 also stipulate requirements as to the contents of the policy, its signing and how the subject matter must be designated.

50. Cap 20.

51. Form 2 of the Schedule to the BSO.

52. Cap 329.