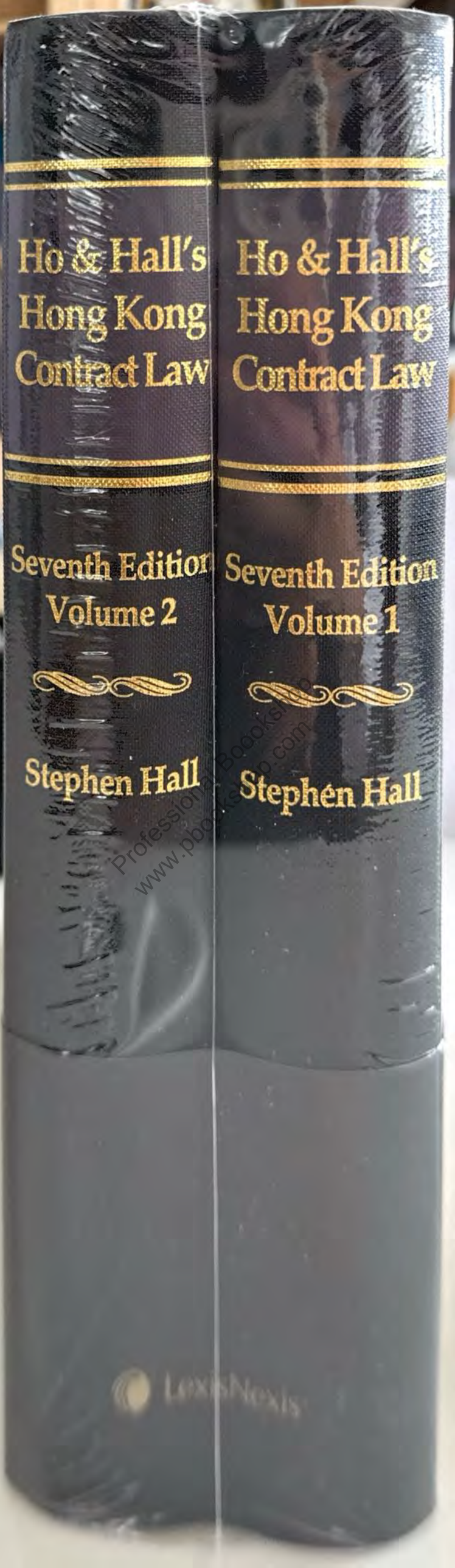
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# HO & HALL'S HONG KONG CONTRACT LAW

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| QB | Court of Queen's Bench, or Queen's Bench Division (England and Wales) |
| SC | Supreme Court (Hong Kong) |
| SC, Eng | Supreme Court of the United Kingdom |
| SC, NSW | Supreme Court of New South Wales |
| SC, NZ | Supreme Court (New Zealand) |
| SC, US | Supreme Court of the United States |
| SC, Vic | Supreme Court (Victoria) |
| Sess | Court of Sessions (Scotland) |



# CHAPTER 1

# INTRODUCTION

## 1. NATURE OF 'CONTRACT'

[1-1] In civil law jurisdictions, authoritative definitions of 'contract' are to be found in legal codes. The Civil Code of mainland China, for instance, provides that a 'contract is an agreement on the establishment, modification, or termination of a civil juristic relationship between persons of the civil law'.[1] The French Civil Code defines a contract as 'an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something'.[2] Italian law stipulates that a contract is 'the agreement of two or more parties to establish, adjust or terminate a legal relationship between them'.[3] A contract under Dutch law is defined as an agreement which is a 'juridical act under which one or more parties have subjected themselves to an obligation towards one or more other parties'.[4] In the Philippines, a contract is defined as 'a meeting of minds between two persons whereby one binds himself, with respect to the other, to give something or to render some service'.[5] A 'civil contract' in Vietnam is an 'agreement between parties in relation to the establishment, modification or termination of civil rights and obligations'.[6] Thailand's

1 '合同是民事主体之间设立、变更、终止民事法律关系的协议': Civil Code of the People's Republic of China, art 464.

2 '*Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose*': *Code Civil*, art 1101.

3 '*Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale*': *Codice Civile*, art 1321.

4 '*Een overeenkomst in de zin van deze titel is een meerzijdige rechtshandeling waarbij een of meer partijen jegens een of meer andere een verbintenis aangaan*': *Burgerlijk Wetboek*, Boek 6: art 213(1).

5 '*Ang kasunduan ay pagtatagpo ng kaisipan sa pagitan ng dalawang tao na kung saan ang bawat isa ay kapwa tutupad ayon sa isat isa, magbigay ng bagay o gumawa ng ilang gawain*': Civil Code of the Republic of the Philippines, art 1305.

6 '*Hợp đồng là sự thỏa thuận giữa các bên về việc xác lập, thay đổi hoặc chấm dứt quyền, nghĩa vụ dân sự*': Civil Code of the Socialist Republic of Vietnam, art 385.

Civil and Commercial Code similarly defines a contract as an 'agreement between two or more parties that creates, modifies, or extinguishes an obligation'.[7]

**[1-2]** The common law has a much longer history than the codes of civil law jurisdictions, and depends primarily on the accumulated jurisprudence of many centuries to frame (rather than define) juridical ideas such as 'contract'. There is no single authoritative definition of contract, but there are numerous highly persuasive formulations which are similar to each other and to the definitions authoritatively adopted in most codified legal systems. Thus, a contract has been characterised as: 'a promise or set of promises which the law will enforce';[8] 'an agreement giving rise to obligations which are enforced or recognised by law';[9] 'a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty';[10] 'an agreement giving rise to obligations which are enforced or recognised by law';[11] and 'a promise … legally binding on the person making it'.[12]

**[1-3]** The thread uniting these various definitions and formulations is the existence of an agreement, or a promise, or a set of promises, or a meeting of minds which creates obligations binding in law. It is obvious from these definitions and formulations that promises or agreements are divided into those recognised by law and those not so recognised. The fact that there is, and the principle that there be, a demarcation between promises and agreements enforceable by law and those that are not, is common to all major legal systems of the world. Different legal systems employ varying approaches to delineating boundaries, and the common law is often criticised for the strictness with which it denies legal recognition to gratuitous promises.[13]

## 2. Freedom and Sanctity of Contract

**[1-4]** A promise or an agreement is an act of voluntary will. Indeed, the principal feature of contractual obligations is that they are freely undertaken by the contracting parties themselves. Contracts therefore establish voluntary obligations. Torts, by contrast, involve obligations imposed on parties without their consent—torts are thus involuntary

7 'สัญญาคือข้อตกลงระหว่างบุคคลสองคนหรือมากกว่าที่ก่อให้เกิด แก้ไข หรือระงับภาระผูกพัน' Civil and Commercial Code of the Kingdom of Thailand, art 354.

8 *Chitty* at para 1-050.

9 *Chitty* at para 1-050.

10 *Restatement*, s 1.

11 *Treitel* at para 1-001.

12 *Anson* at 1–2.

13 See **Chapter 4** on Intention.





obligations. This broad categorical distinction between voluntary and involuntary obligations has deep historical roots and is ubiquitous among the world's principal legal systems:

> [T]he distinction between contract and tort/delict is essentially the same in both civil law and common law. It was originally articulated by Roman jurists (see *Gaius, Justinian's Institutes*, 3.88) and it remains the case that (a) contracts and (b) the law of tort are separate sources of obligations. Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.[14]

**[1-5]** Thus, contractual obligations are thought of as self-imposed. Under the banner of 'freedom of contract', parties are at liberty to decide whether or not to enter into a contract and to prescribe for themselves the scope of their rights and obligations thereunder. Under the banner of 'sanctity of contract', the function of the common law court is to ascertain what was self-imposed as an act of voluntary will and enforce the resulting agreement. It is not the task of a common law court to impose on the parties an agreement that it regards as reasonable or just. Rather, its task is to enforce the agreement made by the parties themselves. This is because, in the context of the common law of contract, justice is done by giving effect to the agreement of the parties. Freedom and sanctity of contract, in this sense, reached its apogee in the common law of the 19th century:

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.[15]

**[1-6]** The 19th century was, indeed, the classical age of the common law of contract. This was only partly because it was the century during which many of the common law's foundational doctrines of contract were explicitly articulated and developed. Just as importantly, contract provided a governing paradigm for thinking about politics, society and

14 *Robinson v P E Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44, [2011] 3 WLR 815 at para 79, per Jackson LJ.

15 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (Ch) at 465, per Sir George Jessel MR; In *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 903, [1989] 1 WLR 255 (QB) at 257, Steyn J remarked that, '[t]hroughout the law of contract two themes regularly recur – respect for the sanctity of contract and the need to give effect to the reasonable expectations of honest men'.

economics in the liberal spirit of the Victorian age.[16] Sir Henry Sumner Maine (1822–1888) influentially argued that the rise of contract liberated people from static social and economic relations and that 'the movement of the progressive societies has hitherto been a movement *from* Status *to* Contract'.[17] The whole structure of society and economics was regarded as resting increasingly on vast networks of contractual relations and even less on the privileges and customs of class and birth. Facilitating this intellectual trend was England's long history of political theorising about various conceptions of a social contract, epitomised by the very different approaches of Thomas Hobbes (1588–1679) and John Locke (1632–1704).[18] Dr A H Manchester incisively observed of English society and contract law in the 19th century that, 'Individual liberty was the watchword: contract was its legal spearhead'.[19]

**[1-7]** The age of classical liberalism in English law and society began decisively to recede, however, with the rise of mass collectivist industrial and political movements which preceded, was spurred by, and followed the First World War. While freedom and sanctity of contract have never been completely dethroned, their sovereignty has been increasingly diminished by competing conceptions of substantive fairness in contractual relations, especially where consumer agreements are concerned:

> Today the position is seen differently. Freedom of contract is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.[20]

**[1-8]** Many inroads have been made into the concept of freedom of contract. The legislatures of most western jurisdictions have intervened to protect the weaker party. Even Hong Kong has seen some statutory intervention. At the same time, courts have employed orthodox theories to redress any imbalance in bargaining power. The wariness of the courts towards exemption clauses, most evident in consumer contracts, is an example of such judicial endeavours.

16 *Hall* at 44–49.

17 Sir Henry Sumner Maine, *Ancient Law* (John Murray 1861) at 170 (emphasis in original).

18 See, especially, Thomas Hobbes, *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill* (Andrew Crooke 1651); John Locke, *An Essay Concerning the True Original Extent and End of Civil Government ('Second Treatise on Government')* (published anonymously, 1689).

19 A H Manchester, *A Modern Legal History of England and Wales, 1750–1950* (Butterworths 1980) at 267.

20 *Anson* at 4.





**[1-9]** It is easy to view these inroads as part of a progressive march towards a more just and socially responsible law of contract. However, they can also be understood as a partial reversion to a pre-liberal and paternalistic conception of contractual relations of the sort that was gaining traction in the 17th and 18th centuries,[21] albeit now in more complex social and economic circumstances.

**[1-10]** Even so, the principles of freedom and sanctity of contract are impressed deeply into the common law's fabric and are still very much with us. Nazareth NPJ, for instance, affirmed that 'the reasonable expectations of honest men' could not justify a violation of the sanctity of contract where the parties have freely expressed their agreement in clear terms.[22] In the absence of frustration or vitiating elements in the making of the contract, the parties will be held to the contract they made and the courts will enforce the contract in accordance with its terms. This does not mean, however, that the parties will necessarily be compelled actually to perform the obligations undertaken in the contract, but merely that the non-breaching party will have one or more remedies if the contract is not performed.[23]

## 3. Sources and Nature of Contract Law in Hong Kong

**[1-11]** The law of contract in Hong Kong is almost completely a matter of the common law and equity. There are a few statutes governing various aspects of a contract, but they assume the existence of case law and are inoperable and even incomprehensible independently. This stands in contrast to the codified legal tradition that prevails in civil law systems.

**[1-12]** The common law is essentially a customary system, which proposition has a long and respectable pedigree. A full treatment of the common law's essentially customary nature is beyond the scope of this book, but for present purposes it is worth noting that an impressive consensus has long subscribed to a vision of the common law as customary or essentially customary in character. As Sir Frederick Pollock (1845–1937) observed, 'the Common Law is a customary law if, in the course

21 *Hall* at 42–44, 47.

22 *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd* [1998] 4 HKC 377 at 386, (1997–98) 1 HKCFAR 256 at 278, [1998] 2 HKLRD 645 (CFA) at 665; cf *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, [1980] 2 WLR 283 (HL) at 843, per Lord Diplock, affirming as a basic principle of the common law of contract that the parties are free to determine for themselves the obligations binding upon them.

23 See **Chapter 19** on Remedies.

of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so'.[24] In the United Kingdom Supreme Court, Lord Sumption observed that the common law is a system of 'judge-made customary law', before remarking:

> The common law is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and principles which, barring some radical change in the values of our society, is developed organically, building on what was there before.[25]

**[1-13]** The common law is more aptly characterised as 'judge recognised' customary law, rather than 'judge made' customary law. This reality has been acknowledged in Hong Kong's Court of Final Appeal. In acknowledging that the court should have regard to English judicial authority interpreting United Kingdom legislation in materially identical terms to a Hong Kong enactment, Sir Gerard Brennan NPJ observed:[26]

> ... it does not follow that this Court should automatically apply the United Kingdom decisions. Judges develop the common law and interpret statutes against a background of the social, moral, economic and political values and assumptions of the societies in which they work. Inevitably, these values and assumptions influence the development of the common law and the interpretation of legislative texts. But the values and assumptions of societies are not necessarily the same. This is the reason why the courts of former United Kingdom colonies have legitimately developed the common law of their countries so that it no longer retains its unity with the common law of the United Kingdom ...

**[1-14]** Instead of applying an enacted codified rule to a dispute, common law courts seek to apply the law as derived from the customs, traditions and expectations of the community, as reflected primarily in previous judgments. The composition of the 'community' can change depending on the activity governed by a contract, so that the community of those engaged in, say, the construction industry is distinct from those engaged in shipping. When judicial precedent no longer reflects the changed expectations of the community, it tends to lose its persuasive force, and the common law rule is judicially refined or reformulated better to accord with the new social realities. This adaptation occurs at two levels. In the shorter term, it is confined to the modes in which rules are applied to particular

24 Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* ((reprint of 6th edn, 1929), Gaunt 1994) at 254.

25 *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, [2017] 1 All ER 191, [2016] 3 WLR 399, [2016] 2 Lloyd's Rep 300 at para 226.

26 *Kensland Realty Ltd (in liq) v Tai, Tang & Chong (A Firm)* [2008] 3 HKC 90, (2008) 11 HKCFAR 237 (CFA) at para 168.





sets of facts, so that what is reasonable in England will not necessarily be so regarded in Hong Kong or other common law jurisdictions, and vice versa. In the longer term, the rules themselves undergo a very gradual but inexorable adaptation to local customs and expectations.

**[1-15]** The essentially customary character of the common law has implications for the process of identifying and applying legal rules and principles. Whereas the civil law tradition employs primarily a process of deductive reasoning (deducing solutions to disputes downwards from codified rules), the common law tradition embraces primarily a process of inductive reasoning (inducing solutions to disputes upwards from the facts of the present case, and the facts and reasoning in earlier cases). The essentially customary and evolving character of the common law largely accounts for the lack of system and symmetry in its law of contract relative to the legal rules of contract to be found in civil law systems. It should not be surprising that the resulting complex of rules and principles in the common law often fails to conform to the strictures of scientific classification. As Michael Kirby remarked in his capacity as President of the New South Wales Court of Appeal, 'the law of contracts serves the marketplace. It does not exist to satisfy lawyers' desires for neat rules'.[27]

**[1-16]** Prior to the transfer of sovereignty functions over Hong Kong to the political authorities on the Chinese mainland on 1 July 1997, England's common law and rules of equity were in force in the Crown Colony by virtue of the Application of English Law Ordinance (Cap 88).[28] This importation was effective, however, only to the extent that it was 'applicable to the circumstances of Hong Kong or its inhabitants'[29] and 'subject to such modifications as such circumstances may require'.[30] It is this common law and equity which the Basic Law of the Hong Kong Special Administrative Region (the 'Basic Law') maintains in force and adopts in Hong Kong, subject to enactment by the Hong Kong legislature and the Basic Law itself.[31]

**[1-17]** Decisions of the Judicial Committee of the Privy Council hearing appeals from Hong Kong were binding on Hong Kong courts. Decisions of the Judicial Committee of the House of Lords were not strictly binding,

27 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 (CA, NSW) at 24.

28 *Hall* at 49–57.

29 Section 3(1)(a) of the Application of English Law Ordinance (Cap 88). For an instance where an English customary usage was held inapplicable to the circumstances of Hong Kong's Chinese inhabitants, and therefore inapplicable as a matter of common law to the interpretation of a contractual term, see *Lau Yeong Wood v The Standard Oil Co of New York* (1908) 3 HKLR 53, [1908] HKCU 6 (SC).

30 Section 3(1)(b) of the Application of English Law Ordinance (Cap 88).

31 Basic Law, arts 8, 18 and 160.

but 'their authority was very great unless the decision was in a field where local circumstances made it appropriate for Hong Kong to develop along different lines'.[32] Other decisions of common law courts were persuasive as to the requirements of the English common law, with special respect (bordering on deference) being shown to decisions of the Privy Council and the English Court of Appeal.

**[1-18]** The Application of English Law Ordinance ceased to be operative upon the transfer of sovereignty functions over Hong Kong to the political authorities on the Chinese mainland[33] and the status of English judicial precedent in Hong Kong has been affected by that transfer. Article 84 of the Basic Law provides that Hong Kong's courts 'may refer to precedents of other common law jurisdictions' without specifying any special role for the precedents of English courts.

**[1-19]** The position since July 1997 is that decisions of the Privy Council on appeal from Hong Kong (all of which pre-date the transfer of sovereignty) continue to be binding on all Hong Kong courts except the Court of Final Appeal ('CFA'), which was established to replace the Privy Council as the highest court for the territory. This new peak court, 'like its counterparts in the United Kingdom, Australia and New Zealand (amongst other jurisdictions), has an important, if not pivotal, role in the

32 *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1, (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576 (CFA) at para 15.

33 On 23 February 1997, the Standing Committee of the National People's Congress, in whom the power of interpretation of the Basic Law is vested by art 158(1) of the Basic Law, published its Decision 'On the Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law'. Article 160 of the Basic Law provides in part as follows: 'Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law'. The Application of English Law Ordinance (Cap 88) was included in Annex 1 to the Decision as contravening of the Basic Law, and not adopted among the laws of the Hong Kong Special Administrative Region. The Decision of 23 February 1997 'represents the Standing Committee's declaration made pursuant to the duty delegated to it by art 160 of the Basic Law of excluding incompatible laws. In carrying out that duty, the Standing Committee listed in Annexes 1 and 2 of the Decision a number of ordinances, items of subsidiary legislation and particular legislative provisions previously in force in Hong Kong which it decided were in contravention of the Basic Law and which therefore were not adopted as part of the HKSAR's laws on 1st July 1997' (*Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151, (2011) 14 HKCFAR 95 (CFA) at para 312, per Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ. See also *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 315 at 328–329, [1997] HKLRD 761 (CA) at 776, per Chan CJHC.





development of the common law worldwide'.[34] Privy Council decisions will be respected by the CFA, but the CFA may depart from them (and from its own decisions) in order to avoid inhibiting a proper development of the law and causing injustice in individual cases. Indeed, the CFA resembles its peak common-law counterparts abroad also in that it plays a key role in keeping the common law abreast of and adapted to local conditions. The power to engage in departures from Privy Council precedent must, however, be used with 'great circumspection' and 'exercised most sparingly'.[35] Decisions of the Privy Council and the House of Lords made after July 1997 will not be binding in Hong Kong, but will continue to be respected by the Region's courts.[36]

**[1-20]** Since the transfer of sovereignty functions over Hong Kong to the political authorities on the Chinese mainland, English judicial authority has continued to play a leading role in the development of Hong Kong's common law. This continuing preference for English precedent over the case law of other common law jurisdictions is largely the product of judicial habit, background, and training. It can, however, also be explained by a perceived imperative to maintain juridical continuity and stability in the wake of the United Kingdom's withdrawal from the territory:

> [T]he intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system, except those provisions which contravene the Basic Law, has to continue to be in force. The existing system must already be in place on 1 July 1997. That must be the intention of the Basic Law.[37]

**[1-21]** This is not to say that judicial authority from non-English common law jurisdictions remains as marginal as it did before July 1997.

34 *Re Pannick QC* [2004] 1 HKLRD 950, [2003] HKCU 758 (CFI) at para 16, per Ma JA.

35 *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1, (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576 (CFA) at para 20.

36 *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1, (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576 (CFA) at paras 6–15. The same respect must logically be extended to decisions of the Supreme Court of the United Kingdom which assumed the judicial functions of the House of Lords on 1 September 2009.

37 *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 315 at 325, [1997] 1 HKLRD 761 (CA) at 774, per Chan CJHC. Cited with approval in *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151, (2011) 14 HKCFAR 95 (CFA) at paras 76 and 449, per Bokhary PJ and Mortimer NPJ. See also *Leung Kwok Hung v The President of the Legislative Council of the Hong Kong Special Administrative Region* [2007] 1 HKLRD 387, [2007] HKCU 112 (CFI) at para 75, per Hartmann J.

On the contrary, the Hong Kong courts have increasingly turned to judicial precedent from other common law jurisdictions in the development of Hong Kong's common law and its constitutional and legislative regime of fundamental rights:

> After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions.[38]

**[1-22]** Australian judicial precedent in particular has played an increasingly important role in the development of Hong Kong's common law. This may be partly explained by the significant presence of former Australian judges among the Non-Permanent Judges of the Court of Final Appeal. It may also be partly explained by the fact that Australia's common law is sufficiently similar to England's that it poses no substantial challenge to the continuity and stability of Hong Kong's legal order, but sufficiently dissimilar as to provide useful guidance in the development of the territory's own common law and equity.

## 4. Structure of this Book

**[1-23]** This book begins with an examination of the formation of a contract. Agreement, consideration and intention are dealt with in **Chapters 2**, **3** and **4**. The formal requirements are examined in **Chapter 5**. The terms of the contract so formed are examined in **Chapter 6**. Various vitiating elements that prevent the full enforcement of the contract so formed—misrepresentation, mistake, duress, undue influence, incapacity, and illegality—are considered in **Chapters 7** to **11**. Matters affecting the parties to, and persons affected by, a contract—joint obligations and rights, privity and assignment—are dealt with in **Chapters 12** to **14**. The performance (**Chapter 15**) and discharge of a contract (**Chapters 16** to **18**) and remedies for breach of contract (**Chapter 19**) and limitations on bringing actions in contract (**Chapter 20**) are then discussed. Estoppel, unjust enrichment and conflict of laws are subjects of study in their own right.

38 *A Solicitor (24/07) v Law Society of Hong Kong* [2008] 2 HKC 1, (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576 (CFA) at para 16.





The risk of demoting them by dealing with them in **Chapters 21** to **23** has had to be taken in order to give the reader a more complete view of matters affecting contracts.

**[1-24]** A few words are in order concerning the method of case summaries. Rather than burden the reader with sometimes incomprehensible and unpronounceable names, parties are generally referred to as 'plaintiff' and 'defendant' (rather than the sometimes more technically accurate 'applicant', 'appellant', 'claimant', 'respondent', etc). There is no particular significance as to which party is a plaintiff or defendant. In practice, this is largely a matter of accident and, in any event, a defendant is often a plaintiff by counterclaim. The reference could just as well be to A or B. Secondly, the cases are taken to illustrate particular issues. Success on a particular issue does not mean success in the action.

**[1-25]** Legislation referred to as Acts are, unless otherwise indicated, English statutes and those referred to as Ordinances are, unless otherwise indicated, Hong Kong ordinances.

**[1-26]** In a book of this nature, definitions and classifications are inevitable. However, one must remember that definitions and classifications are for exposition only. They are useful only if used 'rationally and not too literally'.[39]

39 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 307, [1967] 1 All ER 699 (HL) at 713, per Lord Morris.

# CHAPTER 2

# AGREEMENT

## 1. INTRODUCTION

**[2-1]** In order for a legally enforceable contract to come into existence, there must be:

(1) a complete agreement (*consensus ad idem*);
(2) consideration; and
(3) an intention to create legally binding contractual relations (*animus contrahendi*).

**[2-2]** The requirement of *consensus ad idem* is the subject matter of this chapter. Consideration is dealt with in **Chapter 3** while *animus contrahendi* is discussed in **Chapter 4**.

**[2-3]** The term 'agreement' is frequently used interchangeably with 'contract', referring to a legally recognised or enforceable arrangement. In this chapter, the term 'agreement' is used in a narrower sense to mean complete and certain mutual assent or accord between or among two or more persons as to some obligation or procedure.

**[2-4]** The traditional analysis of the formation and existence of an agreement is an analysis of the occurrence of an offer by one party and acceptance by the other. This method of analysis can sometimes appear artificial and cannot be applied easily in all cases. Pre-contractual communications involving conversations, exchanges of correspondence, and various forms of conduct are often complex and lengthy. Proposals, interspersed with counter-proposals and suggested modifications, further overlaid by inquiries and responses thereto, can create a trail of communications and conduct which is sometimes not easy to analyse in terms of offer and acceptance. Absent execution of a formal contractual document, it may be difficult to ascertain the point at which a final agreement has emerged. This has led to occasional suggestions that the doctrinal mechanics of offer and acceptance are an unsatisfactory device for ascertaining the required *consensus ad idem*. It is at times further suggested that a more realistic approach is to look

at the communications or conduct of the parties as a whole in order to ascertain whether they have reached an agreement.[1] In most instances, however, the correct approach is to identify a definite offer which has been definitely accepted:

> [T]here may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance, but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another is not one of these.[2]

**[2-5]** It may be that a contract that has come into existence as a result of performance is among the exceptional types of contract that need not be analysed in terms of a formal offer and corresponding acceptance.[3] In such cases, the appropriate tools for ascertaining whether a contract came into existence are be provided by authorities such as *Brogden v Metropolitan Railway Co*,[4] *The Aramis*,[5] and *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd*.[6] In particular, it must be shown that the conduct relied upon is unequivocally referable to the putative contract; any reasonable alternative explanation will be fatal to the assertion of a contract.

**[2-6]** Yet, the offer-and-acceptance mechanism of contract formation is applicable to 'the vast majority of cases',[7] and thus provides a useful point of departure. This Chapter deals first with the traditional rules on offer and acceptance and then a number of special areas.

## 2. PARTIES

**[2-7]** The first requirement of an agreement is the existence of two or more parties. The common law rule is that no man can contract with himself, any such 'contract' being void.[8]

1 For example, *Gibson v Manchester City Council* [1978] 2 All ER 583 (CA, Eng) at 586, per Lord Denning MR.

2 *Gibson v Manchester City Council* [1979] 1 All ER 972 at 974, [1979] 1 WLR 294 (HL) at 297, per Lord Diplock; cf *Calimpex International Co (a firm) v ENZ Information Systems Ltd* [1994] 1 HKC 191 (CA) at 196, per Godfrey JA; *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302, [2010] 1 Lloyd's Rep 357.

3 *Trentham (G Percy) Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (CA, Eng).

4 *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 (HL).

5 *The Aramis* [1989] 1 Lloyd's Rep 213 (CA, Eng).

6 *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, [2004] 2 HKLRD 548, [2004] HKCU 380 (CFA).

7 *Trentham (G Percy) Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 (CA, Eng) at 27, per Steyn LJ.

8 *Henderson v Astwood, Astwood v Cobbold* [1894] AC 150 (PC) at 158 (mortgagee selling by auction under power of sale cannot purchase the property himself); *Moore*,





**[2-8]** While this is readily understood where the person involved is an individual, the case is less obvious where the 'persons' involved are different departments of a corporation. The different departments may, as a matter of corporate policy, constitute entirely separate economic units, with each being what is sometimes called a 'profit centre'. However, at common law no contract can be formed between different departments of the same legal entity.[9] On the other hand, there is no reason why separately incorporated corporations within a related group of companies cannot enter into contractual relations as each entity possesses a formally separate legal personality.[10]

**[2-9]** Another commonly occurring situation which presents the same difficulty is the case of contracts between groups of persons where there is common membership in the groups, eg, A contracting with A, B and C; or A and B contracting with A, C and D. At common law, a person cannot enter into a contract with himself and another or others.[11]

**[2-10]** While these common law rules cannot be faulted from the point of view of logic, they are nevertheless somewhat removed from commercial realities. Accordingly, the rule concerning an agreement by a person with himself and another or others has been relaxed by legislation.[12]

*Nettlefold & Co v Singer Manufacturing Co* [1904] 1 KB 820 (CA, Eng) (landlord cannot be the purchaser when he is selling under a distress); *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 (CA, Eng) (a nominee could not grant a lease to his principal since he could not contract with his principal so as to create rights and obligations in relation to the subject of the nomineeship).

9 *Grey v Ellison* (1856) 1 Giff 438 at 443, (1856) 65 ER 990 (Ch) at 992:

> What is produced is an instrument by which some members of this company agreed with other members of the company that, in a certain event, the company shall pay to the company a certain sum of money. It is only necessary to state the terms of such a contract to shew that it is merely an empty formality — an instrument that means nothing. Nobody could sue upon it; no remedy could be obtained in respect of an instrument of this sort by any one member of this company against any other member.

10 As a matter of contract interpretation, however, it is possible that two branches of the same company can be regarded as a 'seller' and a 'buyer' when they conclude an agreement with each other and where there was a general trade practice regarding these inter-office transactions as part of a chain: *Bremer Handelsgesellschaft mbH v Toepfer* [1980] 2 Lloyd's Rep 43 (CA, Eng).

11 *Mainwaring v Newman* (1800) Bos & P 120 at 125, (1800) 126 ER 1190 (CP) at 1193–1194; *Neale v Turton* (1827) 4 Bing 149 at 151, (1827) 130 ER 725 (CP) at 725–726; *Faulkner v Lowe* (1848) 2 Exch 595, (1848) 154 ER 628 (Ex Ch); *Boyce v Edbrooke* [1903] 1 Ch 836 (Ch) at 841–843; *Ellis v Kerr* [1910] 1 Ch 529 (Ch) at 534; *Napier v Williams* [1911] 1 Ch 361 (Ch) at 368.

12 Conveyancing and Property Ordinance (Cap 219), s 25(2):

> (2) An assignment, agreement or covenant—
>
> (a) by a person to, or with, himself and another or others; or
>
> (b) by a person and another or others to, or with, himself,

This relaxation is, however, limited and the common law rule is still a potential trap for the unwary.[13]

**[2-11]** The common law rule also does not apply where a person has different capacities. That is to say, a person in one capacity may contract with himself in another capacity such as a trustee, executor, administrator or agent.[14]

**[2-12]** Most contracts involve two parties. There are, however, contracts that involve more than two parties. There may be differences in the analysis of the formation of bilateral and multilateral contracts but the legal consequences and incidents of contract are the same.

**[2-13]** The number of parties must not be confused with the number of persons involved. One party to a contract may comprise more than one person, eg, if A and B jointly borrow from C, A and B are one party to the contract and C is the other. The rules applicable where one party comprises more than one person are discussed in **Chapter 12**.

## 3. Offer

### 3.1 Definition

**[2-14]** An offer is 'an expression by one person or group of persons, or by agents on his behalf, made to another of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered

shall, unless the contrary intention is expressed and otherwise without prejudice to its effect in law, be enforceable between the parties as if that assignment, agreement or covenant were made—

(i) in the case of paragraph (a), to, or with, the other or others alone; or

(ii) in the case of paragraph (b), by the other or others alone.

13 The limitations are first, the section applies only to 'assignments, agreements and covenants relating to land and other property': s 25(5). The phrase 'other property' is not defined. Even if 'other property' were widely defined, s 25(2) would still probably not be applicable to contracts creating obligations *in personam*, eg, A agrees with A, B and C to perform a service. Second, the enforceability of assignments, agreements or covenants within s 25 is only as between the parties as if the common party were non-existent. This expresses the judicial interpretation of the corresponding section of the Law of Property Act 1925 (UK). In *Ridley v Lee* [1935] Ch 591 (Ch) at 603–604, it was held that a covenant made by A, B and C with A was void notwithstanding the statutory provision which enabled B and C to enforce the covenant against A, because A was still faced with the problem that as regards one-third of the interest he was covenanting with himself, which remained void.

14 *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197 (HL) (administrator); *Rowley, Holmes & Co v Barber* [1977] 1 All ER 801, [1977] 1 WLR 371 (EAT) (personal representative). See also the Conveyancing and Property Ordinance (Cap 219), s 25(1).





certain'.[15] The person making the offer is customarily referred to as the 'offeror', and the person to whom the offer is made is correspondingly referred to as the 'offeree'.

**[2-15]** The offeror's intention is usually to be determined according to an objective test. Words and conduct will amount to an offer where a reasonable person in the position of the offeree would understand them to mean that the offeror intends to be contractually bound, and where the offeree did so understand them.[16]

**Illustration**

***Harvey***. Plaintiff was interested in buying a property known as Bumper Hall Pen, owned by Defendant. Plaintiff telegrammed Defendant: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price — answer paid'. Defendant telegrammed his reply to Plaintiff: 'Lowest price for Bumper Hall Pen £900'. Plaintiff then purported to accept Defendant's 'offer' to sell at GBP 900, but Defendant refused to sell. **Held**: for Defendant. Defendant did not make an offer. Rather, Defendant answered only the second question concerning price, thereby indicating his willingness to receive an offer to buy at that price.[17]

**[2-16]** Where the offeree *knew or believed* that the offeror did not intend the terms of the offer to be those that the natural meaning would suggest, he will not be able to assert the contrary position on the basis of the objective test.[18] It is also likely that the objective test will not assist an offeree where he simply formed no view of the offeror's intention to create contractual relations.[19]

15 *Halsbury's (HK)* at para [115.039] (footnotes omitted). See, eg, *Storer v Manchester City Council* [1974] 3 All ER 824, [1974] 1 WLR 1403 (CA, Eng); *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 (CA, Eng).

16 *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158 (CA, Eng).

17 *Harvey v Facey* [1893] AC 552 (PC) at 556.

18 *Etacol (Hong Kong) Ltd v Sinomast Ltd (No 2)* [2007] 2 HKC 73 (CFI); *Ignazio Messina & Co v Polskie Linie Oceaniozne* [1995] 2 Lloyd's Rep 566 (QB) at 571; *O T Africa Line Ltd v Vickers plc* [1996] 1 Lloyd's Rep 700 (QB) at 703; *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep 745 at para 45; *HSBC Bank plc v 5th Avenue Partners Ltd* [2007] EWHC 2819 (Comm); cf in relation to the objective test applied to acceptance of an offer, *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, [2004] 2 HKLRD 548, [2004] HKCU 380 (CFA).

19 *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475 at para 228; [2009] EWCA Civ 1334 at para 22, per Longmore LJ.

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# CHAPTER 9

# DURESS, UNDUE INFLUENCE AND UNCONSCIONABILITY

## 1. INTRODUCTION

**[9-1]** A contract entered into under certain types of threat or pressure may be voidable on the grounds of duress, undue influence, or unconscionability.

**[9-2]** Duress was initially narrow in scope and confined to violence or threats of violence or imprisonment by one contracting party to the person of another contracting party. This variety of threat is often referred to as 'physical duress' or 'duress to the person'. Later, duress was extended to embrace threats made by one party against the other party's property. This variety of pressure is often referred to as 'duress to property' or 'duress to goods'. Still more recently, relief was made available for illegitimate threats of an economic or a financial character under the head of 'economic duress' (which may also have subsumed duress to property).

**[9-3]** Undue influence consists of pressure by unfair persuasion. Whereas duress is concerned with illegitimate threats directed against the victim's life, liberty, property or economic interests, undue influence is concerned with the more subtle situation in which one party deploys unfair tactics or otherwise unfairly abuses his position of trust or influence over the other in order to secure the other's agreement to a contractual bargain or donation. This chapter treats duress as involving threats of some sort and undue influence as involving pressure by unfair persuasion in some form.

**[9-4]** Of more recent vintage than either duress or undue influence is unconscionability. A contract is tainted by unconscionability where one party obtains for himself an unconscientious bargain by deliberately exploiting certain disabilities under which the other party labours. The emphasis here is on the exploitation of the other party's disability.

# 2. DURESS

## 2.1 Nature of duress

**[9-5]** There are two theories regarding the nature of duress. The older view of duress is that a person subject to duress has his will overborne so that he is incapable of making a free choice or acting voluntarily. Many of the older cases dealt with issues of duress expressly on this basis. Hence, the basis for avoiding a contract entered into under duress was the absence of consent.

**[9-6]** In a 1975 House of Lords case,[1] the court analysed the nature of duress and rejected the older view. Instead the view of Glanville Williams was preferred:

> True duress is not inconsistent with act and will as a matter of legal definition, the maxim being *coactus volui*. Fear of violence does not differ in kind from fear of economic ills, fear of displeasing others, or any other determinant of choice; it would be inconvenient to regard a particular type of motive as negativing will.[2]

**[9-7]** The case itself involved a charge of murder.[3] However, their Lordships did not make any distinction between criminal and civil law in their speeches and two of them used the analogy to the law of contract as follows:

> Similarly with duress in the English law of contract. Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms ... The contrast is with *non est factum*. The contract procured by duress is therefore not void: it is voidable — at the discretion of the party subject to duress.[4]
>
> [D]uress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law.[5]

**[9-8]** The contemporary conception of duress now places it on the more realistic theoretical foundation that the victim's will was merely 'deflected'—rather than 'overborne'—by an illegitimate threat. The victim's will is still free in the sense that he may always choose the greater of two evils; defying the threat and taking the consequences, rather than

1 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, [1975] 1 All ER 913 (HL).

2 Glanville Williams, *Criminal Law* (2nd edn, Stevens & Sons Ltd 1961) at 751 quoted by Lord Edmund Davies in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 709–710, [1975] 1 All ER 913 (HL) at 951.

3 As a decision on criminal law, ie, whether duress is a defence to a charge of murder, the case has been overruled: *R v Howe* [1987] AC 417, [1987] 1 All ER 771 (HL).

4 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 695, [1975] 1 All ER 913 (HL) at 938, per Lord Simon of Glaisdale.

5 *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 at 680, [1975] 1 All ER 913 (HL) at 926, per Lord Wilberforce.





submitting to a coerced bargain. Such a course may sometimes commend itself to persons of especially firm principles. Most people will, however, choose the lesser evil if there is no practical alternative.

**[9-9]** The different views of duress are significant for a number of reasons. One is that if the defence of duress depends on the absence of consent then one needs to examine whether there is consent, ie, the consequences of the threats applied; whereas if the defence of duress depends on whether the law accepts what has happened, then one needs to examine the nature of the threats applied, although even in the latter case, the effect of the threats is also relevant.

**[9-10]** Traditionally, duress is classified into different types. With the emergence of modern views of duress, the significance of classification has somewhat diminished. Nevertheless, the different types of duress are usually classified as (1) duress to the person (or physical duress), (2) duress to property (or duress to goods), and (3) economic duress.

## 2.2 Duress to the person

**[9-11]** Duress to the person, or physical duress, consists of violence or the threat of violence to the person, or the deprivation of physical liberty or the threat of such deprivation.

### Illustrations

(1) ***Cumming***. Plaintiff was being confined in a lunatic asylum and a commission of lunacy was sued against her by Defendants. During the inquisition, but before verdict, Plaintiff's lawyers reached an agreement whereby she would be released from the asylum in return for her surrendering possession of certain title deeds to Defendants. Subsequently, she commenced proceedings to recover possession of the deeds. **Held**: for Plaintiff. Plaintiff was entitled to possession because 'she was induced to resign [the deeds] by fear of personal suffering brought upon her by her confinement in a lunatic asylum by the acts of the defendants'; alternatively, she was indeed a lunatic, in which case she lacked capacity to conclude the agreement or to appoint counsel to represent her.[6]

(2) ***Wa Lee***. An employee of Plaintiff and three other men including a triad kidnapped the owner of Defendant company, took him to an office associated with Plaintiff, and told him that he would not be released until he signed a loan agreement between Plaintiff and Defendant (to replace an illegal loan). He signed the agreement and was told that he

6 *Cumming v Ince* (1847) 11 QB 112, (1847) 17 LJQB 105 (QB).

would be required to sign further ancillary documents and that two men would be stationed at his office 'to keep an eye on him' until that happened. Plaintiff commenced proceedings to enforce the loan agreement, but Defendant raised duress. **Held**: for Defendant.[7]

(3) ***Kosasih Muanto:*** Plaintiff was kidnapped in Hong Kong, falsely imprisoned in Shenzhen, and subjected to minor injuries to his wrists and knees. He was released only after he signed an acknowledgement of debt and sale and purchase agreements in respect of his properties in Hong Kong and Shenzhen in partial discharge of the acknowledged debt. Plaintiff sought declarations that the agreements were void for duress. **Held**: for Plaintiff.[8]

**[9-12]** An act or threat of violence against third parties can also amount to physical duress.

### Illustrations

(1) ***Barton v Armstrong***. Defendant was the chairman, and Plaintiff the managing director, of a company. Plaintiff resented what he perceived to be Defendant's unwarranted and excessive meddling in the company's day-to-day operations, and a bitter antagonism developed between them. Defendant was eventually removed from the chairmanship of the company but refused to leave the board except on terms highly advantageous to himself. Plaintiff executed a deed on the company's behalf agreeing to purchase Defendant's shares in the company after Defendant had issued threats of violence, including death threats, against Plaintiff and his family in order to persuade him to conclude the agreement. Plaintiff commenced proceedings for a declaration that the deed was void for duress. **Held**: for Plaintiff.[9]

(2) ***Royal Boskalis***. Foreign contractors who were in Iraq when the first Gulf War broke out in 1990 were induced to conclude agreements with Iraqi authorities by reason of the Iraqi government's threat to use the contractors' personnel as human shields against air attacks by coalition forces. The agreements were held to be voidable on the basis that the threat was 'about as cogent and unconscionable a form of duress as one can imagine'.[10]

7 *Wa Lee Finance Co Ltd v Staryork Investment Ltd* [2004] HKCU 691 (unreported, CACV 148/2003, 17 June 2004) (CA).
8 *Kosasih Muanto v Lei Robert Bo* [2008] 5 HKLRD 605 (CFI).
9 *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, [1975] 2 WLR 1050 (PC).
10 *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 at 730, [1997] 2 All ER 929 at 981, [1998] 2 WLR 538 (CA, Eng) at 590.





**[9-13]** Provided threats or acts of physical coercion have been made in order to obtain the other party's consent, it is not relevant that the victim may have had reasonable alternatives open to him. Moreover, it seems that a threat of physical coercion does not need to be express and can be inferred from the coercing party's past conduct.

### Illustration

***Mir***. Plaintiff was in a close personal relationship with Defendant. Plaintiff purchased a flat apparently for the use of Defendant. Plaintiff provided the funds for the flat's purchase but arranged for the property to be conveyed to him and Defendant as tenants in common with the Plaintiff owning a ¾ share and Defendant a ¼ share. Defendant took up occupation of the flat. Defendant played a leading role in running Plaintiff's business. Plaintiff conveyed his ¾ share in the flat to Defendant so that she became the sole legal owner. Plaintiff discovered that Defendant was having an affair. On 1 June, Plaintiff and Defendant had a meeting at his place of business. That evening, Plaintiff went to the flat where he physically assaulted Defendant over a lengthy period of time as a result of which Defendant suffered severe bruising. Defendant accompanied Plaintiff back to the hotel where he was staying, and he abused her there. Plaintiff moved into the flat on 2 or 3 June where he remained until he departed on 18 June. On 12 June, at Plaintiff's insistence, Defendant executed a deed of gift by which she transferred a ½ share in the flat to Plaintiff. Plaintiff commenced proceedings claiming, on the basis of the deed of gift, to be the beneficial tenant in common of a ½ share in the flat and seeking an order that the flat be sold. Defendant raised duress as a defence and counter-claimed for, inter alia, a declaration that the deed of gift was voidable for duress and that she had avoided it. Plaintiff's assault on her was the basis of her counter-claim. **Held**: for Defendant. The deed of gift was executed some 11 days after Plaintiff's assaults on Defendant. Yet, it was reasonable in all the circumstances to infer a continuing threat of further assault against the defendant unless she executed the deed.[11]

**[9-14]** *Barton v Armstrong* established that in order to be operative, physical duress need only be one of the reasons why the victim entered into the contract; the fact that the victim may have had other reasons for entering into the contract did not remove the taint of physical duress. Further, once duress is proved, the onus is shifted to the defendant to

11 *Mir v Mir* [2013] 4 HKC 213 (CA).

prove that the duress had no influence on the plaintiff. The plaintiff need not prove that he would not have entered into the contract but for the duress.[12] Similarly, in *Mir*, a deed of gift was voidable for physical duress notwithstanding a plea that the donor might not have executed the instrument had she sought and obtained independent legal advice; 'the availability of a reasonable alternative, including the availability of independent advice, will not be relevant in the case of duress to the person where the victim need only show that the threat was "a" cause of the contract …'.[13]

## 2.3 Duress to property

**[9-15]** Duress to property, or duress to goods, involves seizure or detention of property or a threat thereof. It can also involve damage, or a threat of damage, to property. Originally, the common law's position was that a threat to property was insufficient to establish duress. In *Skeate v Beale*,[14] Lord Denman CJ remarked that 'the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert'.

**[9-16]** It is possible that there was, over the century following *Skeate v Beale*, a decline in what constituted an 'ordinary degree of firmness'. In *The Siboen and The Sibotre*, Kerr J explained the common law's changed attitude to coercion induced by duress to goods in the following terms:[15]

> If I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of physical violence to anyone, I do not think that the law would uphold the agreement. I think that a plea of coercion or compulsion would be available in such cases.

**[9-17]** Duress to property, as a separate sub-class of duress, has now lost most of its significance owing to the recent and continuing emergence of a doctrine of economic duress.

12 *Barton v Armstrong* [1976] AC 104 at 118–119, 120, [1975] 2 All ER 465, [1975] 2 WLR 1050 (PC); *Liao Zhiqiang v Cheung Sin Ling* [2022] HKCFI 892, [2022] HKCU 1401 at paras 90–91; *Re Dai Yumin* [2022] HKCFI 950, [2022] HKCU 1468 at paras 106–110; *Pan Sutong v Bank of China Ltd* [2022] HKCFI 1450, [2022] HKCU 2272 at para 19(3); *Chu Huimin v Kwok Ching Ching* [2024] HKCFI 1380, [2024] HKCU 3148 at para 20.

13 *Mir v Mir* [2013] 4 HKC 213 (CA) at para 56, per Fok JA.

14 *Skeate v Beale* (1840) 11 A & E 983, (1840) 113 ER 688 at 690.

15 *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 at 335.





## 2.4 Economic duress

### 2.4.1 Origins of economic duress

**[9-18]** With its doctrinal sources lying in the 1960s and 1970s, economic duress is of considerably more recent vintage than duress to the person.[16] On one view, economic duress can be traced back to the judgment of Lord Denning MR in *D & C Builders Ltd v Rees*,[17] in which he postulated that 'No person can insist on a settlement procured by intimidation'. Traces of economic duress can also be glimpsed in *The Siboen and The Sibotre*,[18] with Kerr J's remarks about threats to burn down houses or slash valuable paintings.[19]

**[9-19]** Economic duress was soon explicitly recognised as a ground of relief in two maritime cases.

**Illustrations**

(1) ***The Atlantic Baron***. Defendants were shipbuilders who had agreed to build a vessel for Plaintiffs. The agreed price was USD 30,950,000, payable in several instalments during the ship's construction. While there were still two instalments to be made, the US currency was devalued by 10% and Defendants demanded an increase by 10% of the remaining instalments. Defendants threatened to stop work unless their demand was met. There was no justification for the demand under the contract's terms. Plaintiffs were in an exposed commercial position because they had agreed to charter the vessel to a major oil company for a period of three years (Defendants had no knowledge of this). Had completion of the vessel's construction been delayed, Plaintiffs would have been unable to honour the charter agreement. Consequently Plaintiffs agreed to pay, and did pay, the additional sums demanded by Defendants. Plaintiffs sought to avoid the agreement to pay the additional sums on grounds of economic duress, and to recover the payments. **Held**: for Defendants. Plaintiffs had indeed made payments under duress, but relief was denied on the basis that they had affirmed the contract by waiting six months after the vessel's delivery to make their claim.[20]

16 See the seminal article by John P Dawson, 'Economic Duress' (1947) 45 Mich L Rev 253.

17 See **[9-26]** et seq.

18 *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 at 335.

19 See **[9-16]**.

20 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] 1 QB 705 at 719, [1978] 3 All ER 1170 at 1182, [1979] 3 WLR 419 (QB) at 432.

(2) ***The Universe Sentinel***. Plaintiff shipowner's vessel was kept at port due to a boycott by tugboat crew. The boycott was ordered by the International Transport Workers' Federation ('ITF') on the grounds that Plaintiff did not comply with ITF requirements for remuneration of and benefits for the crew. ITF threatened to maintain the boycott unless Plaintiff made payments as backpay for the crew and as contribution to ITF's welfare fund. Plaintiff claimed restitution of the welfare-fund payments as having been made under economic duress. **Held**: for Plaintiff.[21]

**[9-20]** Economic duress has since been applied on a number of occasions to relieve parties of their contracts.[22]

## 2.4.2 Elements

**[9-21]** Economic duress involves the making of an economic or financial threat or the application of economic or financial pressure in order to secure the threatened or pressured party's assent to a contract or the making of a non-contractual payment.[23] The elements of economic duress are:[24]

(1) the making of an illegitimate threat, or exertion of illegitimate pressure, by one party;
(2) sufficient causation between the threat or pressure and the threatened party entering into a contract or making a non-contractual payment; and
(3) the lack of any reasonable alternative to the threatened or pressured party giving in to the threat or pressure.

21 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinal)* [1983] 1 AC 366, [1982] 2 All ER 67, [1982] 2 WLR 803 (HL) at 812, 820, 825.

22 For example, *B & S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Atlas Express Ltd v Kafco (Importers & Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641; *Vantage Navigation Corp v Suhail & Saud Bahwan Building Materials LLC, The Alev* [1989] 1 Lloyd's Rep 138; *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718; *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855.

23 Although not essentially economic or financial in character, threats of arrest or prosecution are 'now seen as examples of lawful act [economic] duress': *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815, [2021] 3 WLR 727 at paras 8–9, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

24 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815, [2021] 3 WLR 727 at paras 78–79, 138(ii), per Lord Burrows, and para 1, per Lord Hodge with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.





## 2.4.3 First element : illegitimate threat or pressure

**[9-22]** In order to establish economic duress, a party must prove that his consent to contract resulted from an illegitimate threat made, or illegitimate pressure exerted, by the other party to the contract.

**[9-23]** Not every threat made, and not all pressure exerted, is illegitimate. The dividing line between legitimate and illegitimate threats or pressure can sometimes be hard to draw. If the threat or pressure takes the form of an unlawful act, it will almost certainly be illegitimate. A threat to perform a lawful act is much more likely to be legitimate, although in relatively narrow circumstances where the threatening party's conduct is unconscionable, a threat or pressure in the form of a lawful act can be illegitimate.

### (a) Threat of unlawful act

**[9-24]** A threat to commit an unlawful act (such as a crime, a breach of statutory duty or a tortious obligation) is prima facie illegitimate. A threat of murder, for instance, is clearly illegitimate.[25]

**[9-25]** A threat to breach a contract is, however, potentially more problematic. In *Pao On v Lau Yiu Long*,[26] the Privy Council held that a threat to breach a contractual obligation unless the other party concluded a new contract was not illegitimate in circumstances where there was a justifiable commercial basis for the threat (it was always understood by the parties that arrangements of the sort concluded by the new agreement would need to be established). However, such circumstances are likely to be highly exceptional for reasons earlier articulated by Lord Reid:

> I can see no difference in principle between a threat to break a contract and a threat to commit a tort … Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction.[27]

**[9-26]** Older decisions concerning a demand for new consideration for the performance of pre-existing contractual obligations owed to the promisor[28] can sometimes be explained on the ground of duress.

25 *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, [1975] 2 WLR 1050 (PC).

26 *Pao On v Lau Yiu Long* [1979] HKLR 225, [1980] AC 614 at 635, [1979] 3 All ER 65, [1979] 3 WLR 435 (PC).

27 *Rookes v Barnard* [1964] AC 1129 at 1168–1169, [1964] 1 All ER 367 at 374, [1964] 2 WLR 269 (HL).

28 See **[3-39]** et seq.

### Illustration

***D & C Builders***. Defendant employed Plaintiffs to do work at his premises and in June 1964, Plaintiffs rendered an invoice for about GBP 746. Defendant paid GBP 250 on account. However, Defendant did not pay the balance. From June to November, Plaintiff pressed for payment. In mid-November, Defendant's wife told Plaintiffs: 'My husband will offer you £300 in settlement. That is all you'll get. It is to be in satisfaction'. Defendant knew that Plaintiffs were in desperate financial straits, and facing the prospect of bankruptcy. Plaintiffs decided to accept the offered GBP 300 and see what they could do about the balance afterwards. Plaintiffs took the money and gave a receipt expressed to be in satisfaction of the account. Plaintiffs sued for the balance. **Held**: for Plaintiffs. Plaintiffs, having agreed to a 'settlement procured by intimidation', were not estopped from enforcing the full amount of their claim.[29]

**[9-27]** Threats to institute or maintain civil proceedings are prima facie legitimate because civil proceedings are a lawful means of enforcing claims. However, if the threat amounts to the tort of malicious institution or maintenance of civil proceedings,[30] the threat will be illegitimate.

### (b) Threat of lawful act

**[9-28]** A threat to commit a lawful act is not prima facie illegitimate. In particular, normal commercial pressure does not constitute an illegitimate threat or illegitimate pressure.[31]

### Illustration

***Padilla***. Defendant was a director and beneficial owner of a company that distributed cosmetics. An advertising agency had obtained summary judgment against the company for about HKD 1.7m in respect of fees outstanding under an advertising services agreement. In order to place pressure on the company to pay its judgment debt, Plaintiff (a director of the advertising agency) threatened to publish in the print media an advertisement concerning the company's indebtedness to the advertising agency. Had the advertisement been published, it could have

29 *D & C Builders Ltd v Rees* [1966] 2 QB 617 at 625, 626, 632, [1965] 3 All ER 837, [1966] 2 WLR 288 (CA, Eng).

30 *Halsbury's Laws of Hong Kong* (2nd edn, LexisNexis Butterworths, 2011 Reissue) vol 47 on Tort at para [380.375].

31 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815, [2021] 3 WLR 727 at para 97.





proved embarrassing to the company and injurious to its relationship with an important client. In a successful move to prevent publication of the advertisement, Defendant agreed with Plaintiff to guarantee and be personally liable for the company's indebtedness and to make monthly payments until the debt was extinguished. The company itself made the first four monthly payments to the advertising agency totalling about HKD 420,000, but then stopped. No further payments were forthcoming from either the company or Defendant. Plaintiff sued for the balance due under his agreement with Defendant, who argued that the agreement had been procured by economic duress. **Held**: for Plaintiff. '[T]his commercial pressure was neither unjustified nor unwarranted. It was not subtle, but neither was it illegitimate. This was *not* a case of extortion; *per contra* there was a *bona fide* judgment debt ...'[32]

**[9-29]** Where one has no duty to enter into a contract, a threat not to do so unless one's terms are accepted is part of the negotiating process. Such a threat does not vitiate a resulting contract.

### Illustrations

(1) ***Tung Wing***. Defendant was a construction company who had for some time been purchasing steel rods from Plaintiff. These purchases were made pursuant to a standing offer by Plaintiff, so that each order by Defendant constituted an acceptance and brought into existence a new contract. While Defendants were engaged in a construction project on the new Island Line for the Mass Transit Railway Corporation ('MTRC'), Plaintiffs raised the prices of their steel rods. Defendants objected but, because there were liquidated damages provisions for late performance in its contract with the MTRC, it ordered the rods at the new prices. When Defendants refused to pay the difference between the old prices and the new, Plaintiffs commenced proceedings. Defendants maintained that their agreement had been procured by duress. **Held**: for Plaintiff. Plaintiff had not exerted any improper pressure on Defendant, and was under no obligation to enter into any contractual relationship with Defendant or anyone else. The court also noted that Plaintiff was engaged in a highly competitive business and it could not be said that Defendant was left with no practical choice but to accede to the new prices.[33]

32 *Padilla Chien Mateo v Chan Choi Hing* [1997] 1 HKLRD 539 at 545, [1997] HKCU 1104 (HC), per Stone J (emphasis in original).

33 *Tung Wing Steel Co Ltd v George Wimpey International Ltd* (unreported, HCA 3285/1984, 28 June 1985) (CA).

(2) ***CTN***. Plaintiff operated a cash and carry business from several warehouses. Among the goods they traded were cigarettes, consignments of which it purchased in separate contracts from Defendant who enjoyed a monopoly on certain cigarette brands. Defendant also extended credit facilities to Plaintiff. Plaintiff ordered a consignment of cigarettes, which Defendant delivered to the wrong warehouse belonging to Plaintiff. Before Defendant could arrange to redirect delivery, the consignment was stolen from Plaintiff's warehouse. Honestly but incorrectly believing that the goods were at Plaintiff's risk at the time of the theft, Defendant invoiced Plaintiff for the price. Plaintiff at first rejected the invoice but later paid once Defendant threatened termination of credit facilities unless payment was made. Plaintiff commenced proceedings, claiming repayment on the ground that the money had been paid under economic duress in the form of threatened termination of credit facilities in future dealings. **Held**: for Defendant.[34]

**[9-30]** It does not necessarily follow that a threatened lawful act will always be legitimate. Although the 'boundaries of the doctrine of lawful act duress are not fixed', the requirements of legal certainty make it important that any extension of the doctrine be approached with caution.[35] It has been observed that the decision on whether a threat or pressure has 'crossed the line from that which must be accepted in normal robust commercial bargaining involves at least some element of value judgment'.[36] However, it will be only in 'rare exceptional cases' that a threatened lawful act will be illegitimate.[37]

**[9-31]** The high threshold of illegitimacy will not be met where the threat is accompanied by conduct or a demand which is in all the circumstances reasonable.

### Illustration

***Bravo Two Zero***. Defendant was a former member in the 'Bravo Two Zero' patrol of the United Kingdom's Special Air Services (SAS) who authored a published account of the patrol's exploits in the 1991 Gulf

34 *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA, Eng).

35 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at para 3, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

36 *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205 (QB) at para 26, per Deputy Judge David Donaldson QC.

37 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815, [2021] 3 WLR 727 at para 99, per Lord Burrows (see also Lord Hodge at paras 30, 58).





War. The publication was in breach of a confidentiality agreement with Plaintiff (the British government). Defendant maintained that the agreement was voidable for duress because Plaintiff threatened that his failure to sign could result in his transfer out of the SAS. **Held**: for Plaintiff. The threat was both lawful and reasonable (in order to protect the security of defence operations and personnel), and the confidentiality agreement was therefore untainted by duress.[38]

**[9-32]** A remedy for lawful act duress has, so far, been granted in only two classes of cases[39] (1) where a contract has been made as a result of a threat to expose a crime, and (2) where a contract has been made to waive a claim.

#### (i) Threat to expose a crime

**[9-33]** A threat to expose a crime by, or initiate a prosecution against, a person or a member of his family is a threat to perform a lawful act. However, if the threat is attached to a demand that the threatened party conclude a contract with the threatening party as the price of non-exposure, the threat will be illegitimate.[40] As Lord Scarman remarked in *The Universe Sentinel*, 'Duress can, of course, exist even if the threat is one of lawful action; whether it does so depends on the nature of the demand'.[41] Lord Scarman also noted that 'Blackmail is often a demand supported by a threat to do what is lawful, eg, to report criminal conduct to the police',[42] and that whether a particular threat is illegitimate will often depend on whether the demand is unjustified.

38 *R v Her Majesty's A-G for England and Wales (Bravo Two Zero)* [2003] UKPC 22, [2004] 1 LRC 132, [2003] EMLR 499.

39 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at para 4, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

40 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at paras 4–7, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

41 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366 at 401, [1982] 2 All ER 67 at 89D, [1982] 2 WLR 803 (HL).

42 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366 at 401, [1982] 2 All ER 67 at 89D, [1982] 2 WLR 803 (HL).

**[9-34]** Threats of arrest or prosecution were long seen as falling within the domain of actual undue influence.[43] However, such threats are 'now seen as examples of lawful act duress'.[44]

### Illustration

***Tam Lup Wai***. Plaintiff and Defendant entered into a joint business investment. The venture was unsuccessful, and Plaintiff was determined to recoup his losses from Defendant. At a 12-hour meeting that concluded at 2.45 am, Plaintiff threatened that unless Defendant agreed to a one-sided settlement of his demands, he would cause Defendant, Defendant's wife and their friend to face criminal charges for fraud over aspects of their conduct in the joint venture. The threats were baseless but Defendant was very concerned about involving his wife, who came from a prominent family, in criminal proceedings. He was also concerned about their friend, who was completely blameless in the matter, being dragged into a criminal investigation and prosecution. Defendant agreed to a settlement that gave Plaintiff everything he demanded. A few days later, Defendant informed Plaintiff that he would not comply with the agreement. Plaintiff commenced proceedings for a declaration that the agreement was valid and enforceable. Defendant counterclaimed for a declaration that it was not enforceable. **Held**: for Defendant. The agreement was void for duress. Defendant 'has never before had to withstand this type of pressure, particularly when his Achilles' heel was struck in the form of the prospect that he and those close to him might well be exposed to the indignities of an, albeit false, accusation being made to the police as well as any additional civil litigation that might follow'.[45]

## (ii) Waiver of claim

**[9-35]** It is not unlawful for an offeror to insist that he will not enter into a contract with an offeree unless the offeree accepts a term waiving a claim

43 *Diners Club International (Hong Kong) Ltd v Ng Chi Sing* [1987] 1 HKC 78 (CA); *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657 (QB); *Kaufman v Gerson* [1904] 1 KB 591 (CA, Eng); *Williams v Bayley* (1866) LR 1 HL 200, [1861–73] All ER Rep 227 (HL).

44 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at paras 8–9, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

45 *Tam Lup Wai Franky v Vong Shi Ming Nicolas* [2002] 4 HKC 135 (CFI) at 158, per Deputy Judge Carlson.





he has against the offeror. Indeed, such a term is of the essence to every settlement agreement.

**[9-36]** A threatened lawful act may be illegitimate for the purposes of economic duress only where it is accompanied by 'morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of [actual] undue influence',[46] whereby the offeror deliberately manoeuvres the offeree into a position of vulnerability.[47] As Lord Browne-Wilkinson remarked in *CIBC Mortgages plc v Pitt*,[48] 'Actual undue influence is a species of fraud'. This suggests that the offeror's conduct must be dishonest, deceptive or duplicitous in character.

### Illustrations

(1) ***Times Travel.*** Plaintiff travel agency's business was almost entirely dependent on the sale of airline tickets between the United Kingdom and Pakistan. Defendant was the only airline operating a direct route between the two countries, and Plaintiff was party to an agency contract with Defendant. A number of Defendant's other agents sought recovery of sums allegedly due under their materially identical agency contracts. Plaintiff pressured Defendant not to join those claims, cutting Plaintiff's fortnightly allocation of tickets from 300 to 60 as allowed under the contract. Defendant terminated those contracts and offered each agent a new contract on terms that included waiver of claims under its previous contract. Plaintiff reluctantly accepted the new terms. Nevertheless, Plaintiff subsequently commenced proceedings to recover sums allegedly owing under its previous contract, arguing that the waiver was avoided because of economic duress. **Held**: for Defendant. Defendant's pressure was legitimate, and there was therefore no economic duress.[49]

46 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at para 2, per Lord Hodge; see also *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corp Ltd* [2007] 3 HKLRD 439, [2006] HKCU 1705 (CA) at paras 152–156, where Stock JA expressed the view in obiter that a lawful act could amount to an illegitimate threat or pressure only if it rises to the level of unconscionable conduct.

47 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at paras 4, 10–16, per Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed.

48 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 at 209, [1993] 4 All ER 433 at 434, [1993] 3 WLR 802 (HL) at 808; see also *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, per Jonathan Parker LJ.

49 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815.

(2) ***Zebra Industries***. Plaintiff and Defendant were in a dispute over Defendant's alleged breach of contractual obligations. The dispute had been the subject of various arbitration and court proceedings over a period of about eight years when the arbitrator issued an amended award in favour of Plaintiff in the sum of HKD 268,000 as damages plus interest and costs. According to Plaintiff, this meant Defendant was required to pay more than HKD 510,000, but indicated its intention to appeal against the amended award. Defendant refused to pay on the grounds that the award would be stayed and appealed, and that Plaintiff owed certain sums to Defendant by way of taxed and assessed costs which were available for immediate set-off. These costs, to which Defendant was indeed immediately entitled, came to HKD 18,000 thereby reducing Plaintiff's undoubted entitlement under the amended award to HKD 250,000. Plaintiff was urgently in need of funds to meet fees owed to the arbitrator, and Defendant offered to pay the sum of HKD 400,000 in return for the discontinuance of all Plaintiff's claims. Plaintiff reluctantly agreed, its director declaring: 'I have no choice, I can't get paid if I don't'. Plaintiff commenced proceedings to have the compromise agreement (embodied in a consent order) set aside on grounds of economic duress. **Held**: for Plaintiff. Defendant was in deliberate breach of its obligation to pay the arbitrator's award, which breach 'continued throughout the period in which the parties negotiated a settlement, and so did the pressure generated by withholding the payment of $250,000 to which [Plaintiff] was indisputably and immediately entitled'.[50]

(3) ***Borrelli***. A company had collapsed into an insolvent winding up, and Plaintiff liquidators wished to enter into a scheme of arrangement in order to finance the liquidation. The scheme required shareholder approval. Defendant controlled a crucial minority shareholding in the company and had been its chairman and chief executive officer. In breach of his duty as a former company office holder, Defendant failed to assist Plaintiffs by providing information relevant to the winding up. Defendant sought to use his control over company shares to block the scheme of arrangement, forged a document and procured false evidence in opposition to the scheme. This resulted in delays to approval of the scheme. In order to secure the scheme's approval and meet a court deadline, Plaintiffs agreed not to pursue any claims against and investigations of Defendant. The scheme was then approved by shareholders and the court. Plaintiffs subsequently received reports from the Hong Kong police that Defendant had been

50 *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213 (CFI) at para 109 (emphasis added), per G Lam J.





engaged in criminal activity. Plaintiffs commenced legal proceedings against Defendant for misappropriation of funds from the company, arguing that their agreement with him was invalid for duress. **Held**: for Plaintiffs.[51]

(4) ***Cenk Kaptanoglu***. Plaintiff chartered a vessel from Defendant to carry goods to China. Plaintiffs had contracted to sell the goods to buyers in China, stipulating for a fixed shipment date. Defendant, in repudiation of the charterparty, chartered the vessel to someone else but assured Plaintiff a substitute vessel would be provided onto which the cargo could be loaded at a later date and that Plaintiff would be compensated for all losses resulting from Defendant's failure to provide the original vessel. Relying on those assurances, Plaintiff refrained from arranging an alternative vessel. A few days later, Defendant offered a substitute vessel resulting in a delayed shipment date. Plaintiff opened negotiations for late shipment with the Chinese buyers, who demanded a reduced price for the goods. When Defendant was informed of the buyers' demand, it offered Plaintiff a discount on the freight that fell far short of the sum needed to compensate Plaintiff for the price reduction. Defendant refused to make an alternative offer. Plaintiff accepted Defendant's offer, while reserving its rights to claim damages for breach of the original charterparty. Plaintiff then accepted the buyers' reduced sale price. Later the same day, Defendant gave Plaintiff a 'take-it-or-leave-it' offer for the substitute vessel at the offered discount freightage, and on condition that Plaintiff waive all claims against Defendant. Plaintiff accepted the offer under protest. Plaintiff claimed its losses against Defendant, who raised Plaintiff's waiver. Plaintiff rejoined that the waiver was voidable for duress. **Held**: for Plaintiff. Defendant's activity had been misleading and had lulled and manoeuvred Plaintiff into a position where it had no practical choice but to agree to the waiver.[52]

**[9-37]** It is not unconscionable simply to drive a hard bargain. A threat is not illegitimate because it is made in bad faith (ie, without a genuine belief in the pre-existing legal justification for rejecting the offeree's claim) or because it is made by a party in a stronger or monopoly bargaining position. This is because there is no general duty to negotiate contracts in good faith, no doctrine of unequal bargaining power in commercial contracts, and the regulation of monopolies is a matter for the legislature.[53]

51 *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.

52 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855.

53 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40, [2023] AC 101, [2022] 2 All ER 815 at paras 26–30, 44, 52, per Lord Hodge, with whom

### (c) Implied threats

**[9-38]** The illegitimate threat does not need to be made explicit but can be implied from the circumstances of the case. As G Lam J observed in *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd*: 'Although many cases refer to a "threat", it does not seem … that an express threat is as a matter of principle essential for economic duress'.[54] It is sufficient that the threatened party is left with no practical choice but to submit to a demand.

#### Illustration

***Estinah***. Plaintiff was a foreign domestic helper in Hong Kong who, having been released by her employer, entered into an agreement with Defendant employment agency by which Defendant undertook to provide her with assistance in finding further employment in Hong Kong. Defendant introduced Plaintiff to a new employer. Subsequently, Plaintiff commenced proceedings against Defendant claiming the difference between the consideration of HKD 10,000 Plaintiff provided under the agreement and the maximum amount of HKD 367 that Defendant was permitted to charge by legislation. Defendant had told Plaintiff that unless she paid the agency fee demanded, Defendant would not complete the necessary procedure for her to change to another employer. **Held**: for Plaintiff. For there to be economic duress, 'the pressure applied does not need to be in the manner of an express threat or coercion. … If the victim is left with no practical choice but to submit because of the course of action of the other party, this would suffice'.[55]

### (d) Threats in combination

**[9-39]** Where groups of persons combine to make a threat, different considerations may apply. It has been held that a trade association, in

Lord Reed, Lord Lloyd-Jones, and Lord Kitchin agreed. Lord Burrows concurred in dismissing Plaintiff's claim but dissented on the irrelevance of Defendant's genuine belief in the legal justification for its rejection of Plaintiff's claim; according to Lord Burrows, it was critical that Plaintiff had failed to prove Defendant was acting in bad faith in rejecting Plaintiff's claim and insisting on the waiver. In Lord Burrows' view, Plaintiff would have succeeded had it shown Plaintiff's bad faith together with Defendant having manoeuvred Plaintiff into a position where it had no practical choice but to agree to the waiver.

54 *Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd* [2016] 1 HKC 213 (CFI) at para 98.

55 *Estinah v Golden Hand Indonesian Employment Agency* [2001] 4 HKC 607 (CFI) at 614, per Kwan J.





furtherance of its object of promoting trade interests, may lawfully place a member who has contravened its rules on a stoplist so that other members are required to stop dealing with him and may lawfully impose a fine in lieu of placement of the offender on the stoplist.[56]

**[9-40]** Threats in combination more often occur in the field of industrial relations. In a series of cases, the House of Lords grappled with the problem as to how far the threats can be considered proper. The result of the authorities is that threats causing interference with contractual rights can constitute duress:

(1) A threat to withdraw one's services unless the employer discontinued the employment of a co-worker was not actionable.[57] This has been explained on the ground that the defendants were threatening a lawful act.[58]

(2) A conspiracy to wrongfully and maliciously induce customers and servants to break their contracts with the plaintiff or not to deal with the plaintiff because the plaintiff employed non-union members was actionable. The gist of the action was conspiracy.[59]

(3) A threat to conduct an unlawful strike (the strike being in breach of a contract which provided that disputes should be submitted to arbitration) unless the employer discharged the plaintiff was actionable by the plaintiff against those making the threat.[60]

(4) A threat to induce union members to break their contract in retaliation for non-recognition of the defendant union was prima facie improper and the defendant should be restrained pending trial.[61]

(5) An order to the tugboat crews to boycott and not enter into contracts with the plaintiff so that the plaintiff's ships were stranded in port, was considered to be economic duress. This is what is known as 'blacking' a ship.[62]

56 *Thorne v Motor Trade Association* [1937] AC 797 (HL) at 807, 810, 813, 818, 825.

57 *Allen v Flood* [1898] AC 1 (HL) at 98, 118, 151, 168, 172, 181.

58 *Rookes v Barnard* [1964] AC 1129 at 1169, [1964] 1 All ER 367, [1964] 2 WLR 269 (HL).

59 *Quinn v Leathem* [1901] AC 495 (HL) at 506, 510, 511, 515, 523, 542.

60 *Rookes v Barnard* [1964] AC 1129 (HL) at 1168–1169, 1188, 1201, 1207, 1235.

61 *JT Stratford & Son Ltd v Lindley* [1965] AC 269 at 338–339, [1964] 3 All ER 102 (HL).

62 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366, [1982] 2 All ER 67, [1982] 2 WLR 803 (HL) at 812, 820, 825; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck (No 2)* [1992] 2 AC 152, [1992] 1 Lloyd's Rep 115 (HL) at 120.