

Table of Abbreviations

A	High Court Action
ACJ	Acting Chief Justice
Adm	Admiralty Action
AF	Anglo-French
AG	Aktiengesellschaft
A-G	Attorney General
App	Appendix
AR	Application for Review
art	Article
Assn	Association
BC	Borough Council
Bros	Brothers
CA	Court of Appeal
Cap	Chapter (as in Chapter Number of an Ordinance)
CC	County Council
CFA	Court of Final Appeal
CFI	Court of First Instance
Ch	Chancery Court or Division
ch	chapter (as in chapter number of a book)
CJ	Chief Justice
CJHC	Chief Judge of the High Court
cl(l)	clause(s)
Cmr	Commissioner
Co Ltd	Company Limited
Co	Company
Comm L	Commercial List
Con L	Construction List
Co-op	Co-operative
Corp	Corporation
Crim App	Criminal Appeal
DC	District Court
dec'd	deceased
Dept	Department
Div	Division
DJ	District Court Divorce Jurisdiction
DJ	District Judge
DPP	Director of Public Prosecutions
EC	European Communities
ECC	Employees' Compensation Case
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
Ed	Edition
EEC	European Economic Communities
EOC	Equal Opportunities Commission
Eq	Equity Court or Division
Exch	Exchequer Court or Division
exh	exhibit
FC	Full Court
fn	footnote
Fr	French
G	German

GA Res	Resolution of United Nations General Assembly
Gaz	Gazette
Gk	Greek
HC	High Court
HK	Hong Kong
HKSAR	Hong Kong Special Administrative Region of the People's Republic of China; established on 1 July 1997
HL	House of Lords
(in liq)	in liquidation
Inc	Incorporated
IRC	Commissioner of Inland Revenue
J(J)	Justice(s)
J(J)A	Justice(s) of Appeal
KB	King's Bench Court or Division
Lat	Latin
LC	Lord Chancellor
LF	Law French
LT(A)	Lands Tribunal (Appeal)
M/N	Marginal note
MA	Magistracy Appeal
MC	Magistracy Case
MP	Miscellaneous Proceedings
MR	Master of the Rolls
n	note
NPJ	Non-Permanent Judge(s) of the Court of Final Appeal;
NSW	New South Wales
O	Order
O	Order (of the Rules of the Supreme Court/Rules of the High Court; since 1 July 1997)
OE	Old English
OF	Old French
p	page
para(s)	paragraph(s)
PC	Privy Council
PCA	Privy Council Appeal
PD	Probate Division
PJ	Permanent Judge(s) of the Court of Final Appeal; since 1 July 1997
plc	Public Limited Company
pp	pages
PRC	People's Republic of China
pt	part
pte	Private
Pty Ltd	Proprietary Limited
Pty	Proprietary
QB	Queen's Bench Court or Division
R	Rex, Regina, The King, The Queen
r(r)	rule(s)
reg(s)	regulation(s)
RHC	Rules of the High Court; since 1 July 1997
Rly	Railway
rr	rules
s(s)	section(s)
SAR	Special Administration Region

SC Res	Resolution of United Nations Security Council
SC	Senior Counsel; since 1 July 1997
sch	Schedule
S-J	Secretary for Justice; since 1 July 1997
Sp	Spanish
subs	subsection(s)
t/a	trading as
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USA	United States of America
Vol	Volume
VP(P)	Vice President(s)

A

A fortiori *Lat* – for a stronger reason; all the more; much more so.

A posteriori *Lat* – from that which follows.

A priori *Lat* – from that which comes before; from the cause to the effect.

A1 An expression used in a general sense meaning excellent or physically fit. It is derived from Lloyd's Register of British and Foreign Shipping which awarded varying classification marks to vessels listed in the Register.

AAA The highest rating given by major rating agencies in respect of the creditworthiness and reliability of a corporation, financial institution or government. See also **Bond rating agencies**.

Ab ante *Lat* – in advance.

Ab initio *Lat* – from the beginning. The term is most commonly used in conjunction with the word 'void' to describe transactions or acts (such as contracts or proceedings) which are invalid from the beginning. The term can also be used generally to describe the nature of a matter or an object. See also **Null and void**; **Void**; **Void ab initio**; **Void marriage**; **Voidable**.

Ab intestato *Lat* – from an intestate. From a person who dies without having left a valid will. See also **Intestacy rules**; **Intestate**.

Abandonment The action or process of surrendering, forsaking, giving up completely or finally, or leaving something or someone unprotected.

Contract The relinquishment or discharge of a contract by giving up one's rights in it: *Andre et Cie SA v Marine Transocean Ltd (The Splendid Sun)* [1981] QB 694 (CA). An earlier written contract may be wholly abandoned by a subsequent oral contract. A contract may also be discharged by implication arising from the actions of the parties where such actions establish either an implied agreement to abandon or estoppel: *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1918-19] All ER Rep 702, [1919] 1 KB 78 (DC). See also **Delay**; **Discharge**; **Estoppel**.

Courts A party to an action discontinues the whole action, or withdraws any particular claim or question made in respect of an action, as against any or all of the other parties to that action. For an action begun by writ (The Rules of the High Court (Cap 4A) O 21 r 2(1)); for an

action begun by originating summons (O 21 r 2(3A)); for consensual discontinuation or abandonment of an action (O 21 r 2(4)); for leave of the court (O 21 r 3). See also **Discontinuance of proceedings**; **Notice of abandonment**.

Family Law In relation to a child, the giving up of the child; a morally reprehensible desertion of the child, leaving it entirely unprotected. Abandonment means a person leaving a child to its fate but not handing the child to people in whom that person has confidence: *Watson & Anor v Nikolaisen* [1955] 2 All ER 427, 2 QB 286. It is an offence to unlawfully abandon or expose any child, being under the age of two years whereby the life of such child is endangered, or the health of such child is likely to be permanently injured: Offences Against the Person Ordinance (Cap 212) s 26. It is also an offence for any person over the age of 16 who has the custody, charge or care of a child or young person under that age wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to health: Offences Against the Person Ordinance (Cap 212) s 27. See also **Desertion**; **Likely**.

Maritime law The complete relinquishment of an interest, claim or thing. **1.** In marine insurance, when an assured abandons the subject matter insured, he is effectively relinquishing and transferring all his rights in the property including the claims that may arise from his ownership to the insurer: *Rankin v Potter* (1873) LR 6 HL 83. Where there is a constructive total loss an assured may abandon the subject matter insured to the insurer and treat the loss as if it were an actual total loss: Marine Insurance Ordinance (Cap 329) s 61. The assured must manifest his intention by giving a notice of abandonment to his insurer: s 62. **2.** In maritime law, a shipowner was entitled to abandon the voyage without the consent of the cargo interests in circumstances where the completion of the voyage was physically impossible or so commercially unreasonable as to be impossible. The legal basis for such common law right is not entirely clear but seems to be derived from the doctrine of frustration: *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 (CA). Most bills of lading provide for a liberty clause entitling the shipowner to abandon the voyage in certain circumstances. The validity of such clauses may be subject to the overriding operation of the Hague or Hague-Visby Rules. For an example where a voyage was abandoned by the shipowner due to the grounding of the vessel: *Taitexma*

Act of God An event, occurrence, or accident due to natural causes which occurs independently of human intervention and either could not by any amount of ability have been foreseen, or if foreseen, could not by the exercise of all reasonable skill and care have been avoided. It must be so something overwhelming rather than an ordinary accidental circumstance: *Star Ferry Co Ltd v Owners of the Ship or Vessel 'Argonaut' (Greek Flag) & Anor* [1980] HKC 308 (HC); *Pandorf v Hamilton* (1886) 17 QBD 670 (CA). Whether a particular occurrence amounts to an act of God is a question of fact, depending upon the circumstances of the case. Examples include a violent storm at sea or an earthquake: *Nugent v Smith* (1876) 1 CPD 423 (CA); *Wong Lai Ying & Ors v Chinachem Investment Co Ltd* [1980] HKLR 1. In contract law, an act of God may be a ground for a plea of frustration of the contract. An act of God also affords a defence to common law torts involving strict liability. See also **Force majeure clause**; **Frustration**; **Strict liability**.

Act of grace payment See **Ex gratia payment**.

Act of indecency An offence of a sexual nature involving conduct which right-minded persons would consider to be contrary to community standards of decency. An indecent act coupled with an assault is an indecent assault. Otherwise it is only a common assault. It is not necessary for the judge to direct the jury in detail as to what amounted to circumstances of indecency. This is a matter for the jury to decide: *R v Mok Pak Wo* [1980] HKC 238 (CA). See also **Assault**; **Gross indecency**; **Indecent assault**; **Sexual assault**.

Act of Parliament A body of law passed by the United Kingdom Parliament and given royal assent by the Crown. Prior to 1 July 1997, the United Kingdom Acts of Parliament may be applied to Hong Kong directly through a specific provision therein or indirectly through an Order in Council made under the prerogative of the Crown. For temporary provisions as to the effect of references to United Kingdom Acts of Parliament in the laws of the Hong Kong SAR: Interpretation and General Clauses Ordinance (Cap 1) sch 9.

Act of state 1. A prerogative act of the executive arm of government performed within the territory of the government. An act of state is not subject to judicial investigation by other states. In general, courts will not adjudicate upon the validity of acts or transactions of a foreign sovereign state within that sovereign's own territory: *Nissan v A-G* [1967] 2 All ER 1238, 3 WLR 1644; *Dubai Bank Ltd v Galadari & Ors* *The Times* 26 June 1990. An act of state does not operate as to prevent a person from defending a libel action: *Buttes Gas and Oil Co v Hammer* [1982] AC 888 (HL). An act of state can be pleaded as a bar to jurisdiction to an action arising out of acts done outside the dominions of China, including the Hong Kong SAR by a person who has acted under the authorisation of Chinese or Hong Kong SAR government:

Buron v Denman (1848) 2 Exch 167. It cannot be pleaded against Hong Kong SAR subjects or friendly aliens as a defence to an action arising out of acts done within the territory of Hong Kong SAR: *Johnston v Pedlar* [1921] 2 AC 262 (HL), whilst it is available against an alien enemy: *R v Bottrill, ex p Kuechenmeister* [1947] 1 KB 41. 2. An act performed by a servant of the state in the name of the state in its relations with another state. An act of state includes making a treaty: *Salaman v Secretary of State for India* [1906] 1 KB 613 (CA); acquiring territory: *Cook v Sprigg* [1899] AC 572 (PC). The annexation of Hong Kong by England through treaties was therefore an act of state. An act of state is not justiciable in Hong Kong SAR court: *Cook v Sprigg, supra*; *Winfat Enterprise (HK) Co Ltd v A-G of Hong Kong* [1985] 1 AC 733 (PC). Whether an act is an act of state is to be determined by the court, though in some cases the court will accept a certificate of the Chief Executive as binding: Basic Law art 19; Act of Garrison Army: Law of the PRC on Garrisoning of the Hong Kong SAR, art 26. See also **Alien**; **Alien enemy**; **Executive**; **Treaty**.

Act of third party An act by a person who is not a party to an action or transaction. An act of a third party may operate as a defence, or entitle a defendant to contribution or indemnity against the third party. In negligence, if the act of a third party amounts to a *novus actus interveniens* (intervening cause), breaking the chain of causation, a defendant may not be liable for the consequences of that act: *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd & Ors* [1936] AC 108 (PC). See also **Contribution**; **Indemnity**; **Novus actus interveniens**.

Act of violence A thing done apparently in the course or commission of an offence which has resulted in the injury or death of a person. See also **Violence**.

Act of war In international law, a hostile act through the use of force or the institution of a blockade, directed against the citizens or territory of another state which that state can lawfully consider to be equivalent of a declaration of war. It is most unlikely that Hong Kong could commit an act of war because Hong Kong has no military forces of its own but relies upon the military forces stationed in Hong Kong by the Central People's Government for the purpose of defence and because foreign affairs and defence are matter of the Central Government, which is outside the autonomy of the Hong Kong SAR: Basic Law arts 13, 14. See also **Basic Law**; **Belligerent**; **Bill of lading**; **Blockade**; **Charterparty**; **Declaration of war**; **War**.

Act or omission Doing or refraining from doing something which attracts the operation of the law. Under the Interpretation and General Clauses Ordinance (Cap 1) s 3, the word 'act', when used with reference to an offence or civil wrong, includes a series of acts, an illegal omission and a series of illegal omissions. See also **Actus Reus**.

Acting in company To be physically present in the company of another person with the common purpose of committing an offence with an intention to participate in the commission of the offence in some way. Mere presence during the commission of the offence is not enough. A common intention between the parties must be proved: *Kelly v R* (1989) 90 ALR 481. See also **Complicity**.

Acting in concert Conduct undertaken by two or more persons knowingly. In order to establish that two or more persons are acting in concert, three elements have to be satisfied: (1) the persons come together through an agreement or understanding; (2) there should be active co-operation between the persons in concert to obtain or consolidate control of a company; and (3) their active co-operation should result in an acquisition of voting rights of a company that cause their collective holdings to exceed the mandatory general offer thresholds: Hong Kong Codes on Takeovers and Mergers and Share Repurchases issued by the Securities and Futures Commission. The Codes also contain presumptions that certain categories of persons are acting in concert unless the contrary is established: Rule 26 of the Codes.

Acting in good faith Acting honestly without fraud, collusion, or participation in wrongdoing. Generally, acting in good faith is no defence to a tort, such as defamation, unless the defendant can prove that the imputations against the plaintiff's reputation are true. Also known as 'acting bona fide'. See also **Bona fide**; **Defamation**.

Action Any proceeding in a court of law: Limitation Ordinance (Cap 347) s 2(1). See also **Proceeding**.

Action for divorce See **Matrimonial action**.

Action for loss of services An action at common law *per quod servitium amisit* (by reason of which his or her services were lost) for damages by a person entitled to services from the injured person, against the third party who has deprived him or her of those services through some wrongful act: Law Amendment and Reform (Consolidation) Ordinance (Cap 23) ss 20B, 20C. The action is based on the feudal concept that a master has some proprietary right in the services of his or her servants. The plaintiff must have had a legal right or interest in the services of the injured party. See also **Enticement**; **Servant**.

Action for price A civil proceeding maintained by a seller against a buyer for the price of goods sold, where under a contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, or even though the property in the goods has not passed and the goods have not been appropriated to the contract, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to

pay such price: Sale of Goods Ordinance (Cap 26) s 51. See also **Action**; **Action of debt**.

Action in ejectment A writ arising out of the writ of *trespass de ejectione firma* (trespass by reason of lasting eviction). The action was first developed to allow a lessee to recover possession of land the subject of a lease, but was later used by freeholders to recover estates in land. The action made obsolete the cumbersome and technical real actions, being much more flexible and convenient despite the many fictions used. See also **Freehold**; **Real action**; **Tenant in possession**.

Action in personam An action against the person. In admiralty law, actions which are directed against the person (a defendant) rather than the ship. The right of a beneficiary is a right in personam against his or her trustee. A common law claim for damages in relation to personal injuries is a claim in personam. In equity, actions for injunctive relief and specific performance are actions in personam. An action in personam is contrasted with an action in rem. See also **Action in rem**; **In personam**; **Personal action**.

Action in rem An action against a thing; an act or proceeding available against certain property or the proceeds of such property. An action in rem is most commonly brought in the admiralty jurisdiction: The Rules of the High Court (Cap 4A) O 75. An action in rem is contrasted with an action in personam. See also **Action in personam**; **Admiralty**; **In rem**.

Action in trespass A form of action originating in feudal times designed to bring redress to a person who suffered a wrongful interference, injury or damage to their person, land or chattels. The action in trespass gave rise to many forms of action, including the *trespass de ejectione firmarum* (trespass by reason of lasting eviction), which protected the possession of land by a leaseholder. This in turn gave rise to the action in ejectment, eventually adopted by freeholders to protect their interests in land. See also **Action in ejectment**; **Chattel**; **Freehold**; **Leasehold**; **Trespass**.

Action of covenant An action seeking specific performance or damages for breach of an agreement under seal. The action of covenant came into common use in the thirteenth century, although it could not be brought for the recovery of a debt. It later fell into disuse because it was not available in respect of parol agreements. See also **Covenant**; **Parol contract**.

Action of debt An action to recover a sum certain for an executed consideration. The plaintiff in an action to recover debt is not required to show that any loss or damage was caused by the breach, and the defendant bears the onus of establishing payment by way of discharge as a defence to the action. Also known as an 'action for indebtedness' or 'action for debt due'. See also **Damages**;

Shipping (Registration) Ordinance (Cap 415); the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) and the English Merchant Shipping Acts 1894-1988 in their application to Hong Kong SAR.

Admiralty law The body of law derived from the jurisdiction and practice of the Admiralty Court originally developed in England. It concerns questions and claims relating to ships and shipping. It covers maritime liens, salvage, collisions, cargo and passenger claims, oil pollution, insurance, limitation of liability of ship owners, ownership and charterparty disputes. One unique feature of the admiralty law is that the ship itself, or the 'res', can be made the defendant in legal proceedings. It can be arrested by a claimant and sold by the court to meet the claimant's claim.

Admissibility In relation to evidence, the nature of which being capable of being received by a court or tribunal: Bruce & McCoy, *Criminal Evidence in Hong Kong* [2]. The rules governing the admissibility of evidence are found in both the common law and statute: Evidence Ordinance (Cap 8). As a general rule, all evidence which is relevant to the proceedings in which it is tendered or adduced is admissible: *Halsbury's Laws of Hong Kong*, Vol 12, Evidence para [175.001] et seq. A trial judge has a discretion to exclude evidence even though it is admissible: *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 (HL) (for example where its prejudicial effect outweighs its probative value or where it was obtained unfairly or by a trick; and its reception would be such as to deny the accused a fair trial: *R v Sang, supra*; *R v Cheung Hon Yeung* [1993] 1 HKC 26 (CA); *Tan Siew Gim v R* [1995] 2 HKC 513, 1 HKCLR 299 (PC)). In certain types of proceedings, the rules as to admissibility of evidence are relaxed or do not apply; for example sentencing proceedings: Bruce & McCoy, *Criminal Evidence in Hong Kong* XIV[1]-[2]. Not all courts and tribunals are bound by the rules of evidence, for example, coroner's court: *Halsbury's Laws of Hong Kong*, Vol 12, Evidence para [175.002]. See also **Discretion**; **Evidence**; **Relevance**.

Admissible evidence Evidence received or capable of being received by a court or tribunal of fact for the purpose of proving a fact in issue, because it is relevant to the proceedings in which it is tendered or adduced: *Halsbury's Laws of Hong Kong*, Vol 12, Evidence para [175.001] et seq. The rules governing admissibility of evidence are found in statute: Evidence Ordinance (Cap 8), the common law, and the rules of court: The Rules of the High Court (Cap 4A) O 38. See also **Absence of complaint**; **Admissibility**; **Discretion**; **Evidence**; **Relevance**.

Admission 1. A confession or acknowledgement.
2. The process of entrance or admission.

Civil law A party to a cause or matter gives notice, by his pleading or otherwise in writing, that he admits the truth of

the whole or any part of the case of any other party: The Rules of the High Court (Cap 4A) O 27 r 1.

Criminal law A confession or acknowledgement. A previous representation made by a party to a proceeding which is adverse to the interests of that person in the outcome of the proceedings. An admission influenced by threat or violence may not be admissible. Any fact which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings and the admission by any party of any such fact is, as against that party, to be conclusive evidence in those proceedings of the fact admitted: Criminal Procedure Ordinance (Cap 221) s 65C. Conduct may constitute an admission. The admission by any party of any fact shall as against that party be conclusive evidence in those proceedings of the fact admitted: Criminal Procedure Ordinance (Cap 221) s 65C. See also **Agreed fact**; **Audio recording**; **Confession**.

Legal practitioners Entry into the legal profession. Admission is a prerequisite to the right to carry out legal work. Authority to admit legal practitioners (barristers and solicitors) is vested in the High Court: Legal Practitioners Ordinance (Cap 159) ss 3 (solicitors), 27, 27A (barristers). See also **Barrister**; **Legal practitioner**; **Practising certificate**; **Solicitor**.

Admission of facts A voluntary acknowledgement made as to the existence of the truth of certain facts which are inconsistent with a party's claims in an action; a statement, oral or written, which suggests an unfavourable inference to the party making the statement. An allegation of fact made by a party in his or her pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his or her pleading or a joinder of issue under the Rules of the High Court (Cap 4A) O 18 r 14 operates as a denial of it: O 18 r 13(1). If a party admits a fact in a pleading, the fact is taken as established for the purposes of the proceeding: *British Thomas-Houston Co Ltd v British Insulated & Helsby Cables Ltd* [1924] 1 Ch 203. There is no need for evidence to be called to prove the admission: *Pioneer Plastic Containers Ltd v Cmr of Customs and Excise* [1967] 1 All ER 1053, Ch 597. Facts taken to be admitted include all allegations made by the other party which are not specifically denied by a party in pleadings. In criminal proceedings, facts can be admitted by the parties under the Criminal Procedure Ordinance (Cap 221) s 65C. See also **Agreed fact**; **Notice to admit**; **Pleadings**; **Statement**.

Admixture A substance that is produced by mixing or mingling of different ingredients or components. Duty is payable on any admixture containing methyl alcohol: Dutiable Commodities Ordinance (Cap 109) sch 1 pt IV.

Admonition A reprimand. For example, a barrister found in breach of proper professional standards is liable to be admonished: Code of Conduct of the Bar of the Hong

Kong SAR, para 6. Further, a magistrate has the supplementary power to order an offender who is apparently under the age of 16 years to be discharged after due admonition: Magistrates Ordinance (Cap 227) s 96(a). See also **Disciplinary proceedings**.

Adolescent A person between the age of puberty and the age of majority. The age of majority is now 18 years: Age of Majority (Related Provisions) Ordinance (Cap 410) s 2. At common law, the age of puberty was 14 years for males and 12 years for females, while the age of majority was 21. In family law proceedings where a child is an adolescent, the court, having regarded the welfare of the child as the first and paramount consideration, may give consideration to the child's wishes as to who he or she would like to reside with and any contact he or she may wish to have with the non-residing parent, having regard to the age and understanding of the child and to the circumstances of the case: Guardianship of Minors Ordinance (Cap 13) ss 3, 10. Generally the older the child, the greater weight it is given: *Re Lee Cheuk Wah, an infant* (HCMP 2678/83, unreported). The court may also give such order as it thinks fit for the custody and education of any child of the family who is under 18 in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree: Matrimonial Proceedings and Property Ordinance (Cap 192) s 19(1). See also **Adult**; **Age of majority**.

Adopted child An infant who is under 18 years old adopted by a person or persons, and is the subject person under an adoption order granted by the court pursuant to the adoption legislation, by which the adopted child is deemed to be the child of the adopter and the natural parent or guardian of the child will cease to have any parental rights, duties, liabilities or obligations in respect of the child. The application for an adoption order should be made to the District Court of Hong Kong: Adoption Ordinance (Cap 290) ss 4, 5. See also **Adoption**; **Adoption order**; **Family provision**.

Adopted Child Register A register maintained by the Registrar of Births and Deaths at the general registrar office, in which only such entries as directed to be made by adoption orders are made: Adoption Ordinance (Cap 290) s 18(1). Every adoption order shall contain a direction to make an entry in the Adopted Child Register in the prescribed form: s 19(1). See also **Adoption order**.

Adoptee See **Adopted child**.

Adoption 1. An act signifying acceptance or approval.
2. Incorporation.

Conflict of laws 1. The act by which the text of a proposed treaty is agreed upon and settled by those states involved in drawing up the treaty. Adoption does not necessarily mean that the parties have signed the treaty or intend to be bound by it. Adoption in an international conference takes place

by two-thirds votes of the states present and voting: Vienna Convention on the Law of Treaties 1969 art 9(1). 2. The process of making international law part of municipal law through legislative implementation, judicial decisions, or established custom. For example, the Convention on the Civil Aspects of International Child Abduction signed in Hague on 25 October 1980 was adopted in the Hong Kong SAR through the Child Abduction and Custody Ordinance (Cap 512). Adoption, as a doctrine, asserts that there is a right to incorporate international law into municipal law. See also **International law**; **Municipal law**; **Transformation**.

Contract Acceptance of a contractual obligation by which the adopter would not otherwise be legally bound: *Peyman v Lanjani & Ors* [1984] 3 All ER 703, [1985] Ch 457 (CA). See also **Affirmation**; **Fraud**; **Misrepresentation**.

Family law A legal action or process by which an unmarried person under the age of 18, ceases to be the legal child of his or her birth parents or guardian, and becomes instead the child of the adoptive parents as if born to them in lawful wedlock: Adoption Ordinance (Cap 290). After 31 December 1972, adoption could only be effected under the Adoption Ordinance (Cap 290) while before 1 January 1973, adoption could also be effected under Chinese law and custom: Adoption Ordinance (Cap 290) s 25. Adoption under Chinese customary law and custom was predominantly for the purpose of providing a son to carry out sacrificial ancestral rites and so continue the cult of ancestors, and also be an heir to the property of adoptive father, as well as to continue the stock and keep the family name alive: Leonard Pegg, *Family Law in Hong Kong* (3rd Ed) p 278. The consent of every person who is a parent or guardian of the infant or who is liable to contribute to the maintenance of the infant is required before an adoption order will be made: Adoption Ordinance (Cap 290) s 5(5)(a). However, the court may dispense with such consent under certain circumstances: s 6, or declare an infant free for adoption: s 5A; *Re Phillips* [1987] 1 HKC 503 (HC). See also **Adoption legislation**; **Adoption order**; **Biological parent**.

Adoption legislation Legislation dealing with the adoption of children and related matters. As of 31 December 1972, an adoption in Hong Kong may only be effected in accordance with the Adoption Ordinance (Cap 290). However, it does not affect the status and rights of a person adopted in Hong Kong under Chinese law and custom before 1 January 1973: Adoption Ordinance (Cap 290) s 25. See also **Adopted child**; **Adoption**.

Adoption order An adoption order may be made on application of husband and wife authorising them jointly to adopt an infant or authorising the adoption of an infant by the mother or father of the infant either alone or jointly with his or her spouse: Adoption Ordinance (Cap 290) s 4. Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the

examine the interrogated party on oath as to the sufficiency of his or her answer: O 25 r 5(2).

Ante *Lat* – before.

Antecedent character The honesty, reliability, or disposition of a person prior to the commission or alleged commission of an offence. Generally, an accused must not be cross-examined about his or her antecedent character unless he or she has put his or her character in issue: Criminal Procedure Ordinance (Cap 221) s 54(1)(f). However, a person's antecedent character should be taken into account by a court when assessing a penalty for a crime: *R v Ng Yau Wing* (CACC 209/95, unreported). See also **Antecedent crime**; **Antecedents**; **Character of accused**.

Antecedent crime A prior punishable offence. An antecedent crime constitutes part of a person's criminal history and is therefore relevant to show whether a later crime is an uncharacteristic aberration or reflective of a continuing disobedient attitude towards the law: *R v Vy Van Kien & Anor* [1991] 1 HKLR 422 (HC). But it is wrong in principle to sentence an accused for his record: *R v Woo Kau* (CACC 422/86, unreported); *R v Ng Fung King* [1993] 2 HKCLR 219 (CA). The accused should only be punished for the offence before the court: *R v Cheung Man Kit* (HCMA 379/93, unreported). See also **Antecedent character**; **Antecedents**; **Conviction**.

Antecedents In criminal law, the background and prior convictions of an offender considered for the purposes of sentencing. The word is wide enough to include all aspects, favourable and unfavourable, of an offender's background and past life, including his or her personal, family, social, employment, and vocational circumstances, and current way of life and its interaction with the lives and welfare of others. It is the practice for the prosecution to inform the court of the accused's antecedent in the Court of First Instance and District Court: High Court Practice Direction 9.3, pt III para 13, but not in Magistrates' Courts. Antecedents should be read out in open court: *Hasting v Ostle* (1930) 94 JP 209. Antecedent statement should not be used for any purpose at the trial up to the verdict: *R v Lam Hing Nam & Ors* [1985] 1 HKC 376 (CA). See also **Antecedent character**; **Antecedent crime**; **Offender**; **Sentence**.

Ante-date To write a date on an instrument that is a date prior to its execution. An ante-dated negotiable instrument is not invalid for that reason only: Bills of Exchange Ordinance (Cap 19) s 13(2). See also **Negotiable Instrument**.

Ante-nuptial 1. Before marriage. Financial and non-financial contributions made by a party prior to the marriage can be taken into account by the court in the division of the matrimonial property: *Park v Park* (DJA 760/75, unreported); *C v C* [1990] 2 HKLR 183 (CA);

Matrimonial Proceedings and Property Ordinance (Cap 192) s 7. 2. Before marriage, with a view to entering into marriage, for example ante-nuptial settlement. See also **Ante-nuptial settlement**.

Ante-nuptial settlement A disposition made prior to the marriage which makes provision for the future benefit of the husband, wife, or their children. To be an ante-nuptial settlement, the disposition must be made on the assumption that the marriage will occur and continue: *Hargreaves v Hargreaves* [1926] P 42; *Young v Young* [1962] P 27 (CA). The court has the power to make orders varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage, on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter: Matrimonial Proceedings and Property Ordinance (Cap 192) s 6(c), (d). Such orders are discretionary and the court must consider matters including the financial and non-financial contributions made to the marriage by the parties: *Hui I Mei v Cheng Yau Shing* [1996] 4 HKC 145 (CA); Matrimonial Proceedings and Property Ordinance (Cap 192) s 7. A trust for a spouse can be an ante-nuptial settlement: *Jackson v Jackson* [1973] Fam 99. See also **Ante-nuptial**; **Disposition of property**; **Post-nuptial settlement**; **Property settlement**.

Anticipated pleading Pleadings where the pleader anticipates the defence in advance and pleads, in the statement of claim, in rebuttal to the anticipated defence. Anticipating the defence in the pleadings is considered to be poor pleading: *Hall v Eve* (1876) 4 Ch D 341 (CA). See also **Estoppel**; **Statement**.

Anticipatory breach A breach of contract of a kind entitling the promisee to terminate the contract before the time appointed for the promisor's performance. The promisee's termination is justified if the words or conduct of the promisor, or the promisor's actual position, give rise to a repudiation of obligation or indicate that the promisor was wholly and finally disabled from performing the contract: *Leung Hoi v Ma Koon Sik & Anor* (HCA A3054/92, reported). The concept of anticipatory breach may be part of a wider concept of repudiation: *Afovos Shipping Co SA v Pagnan & Anor The Afovos* [1983] 1 All ER 449 (HL). Also known as 'prospective breach'. See also **Breach of contract**; **Failure of performance**; **Repudiation**; **Termination**.

Anti-discrimination Against the treatment of one or more persons or one or more subjects on an unequal footing without lawful justifications. Such less favourable treatment is the result of one's sex, marital status, pregnancy or disability: Sex Discrimination Ordinance (Cap 480); Disability Discrimination Ordinance (Cap 487); Family Status Discrimination Ordinance (Cap 527). See also **Discrimination**.

Anti-discrimination legislation A generic term given to legislation making discrimination on certain grounds in various areas of public life unlawful. The areas of public life covered by anti-discrimination legislation in Hong Kong are: employment, accommodation, access to goods and services, membership of clubs, and education. The prohibited grounds of discrimination are: sex, disability, family status, pregnancy and trade union membership: Employment Ordinance (Cap 57) pts III, IVA; Sex Discrimination Ordinance (Cap 480); Disability Discrimination Ordinance (Cap 487); and Family Status Discrimination Ordinance (Cap 527). See also **Discrimination**.

Antitrust The United States generic term for the area of competition law, derived from the structures adopted by American business in the nineteenth century to overcome instability in cartels (pooling arrangements) caused by cheating on the cartels. The term derives from the trusts created by powerful corporations, trusts that were the original targets of the 'antitrust' legislation. The model was the Standard Oil Trust formed in 1832. The most significant United States antitrust Acts are the (US) Sherman Act 1890 and the (US) Clayton Act 1914. In Europe, it is referred to as 'competition law'. An antitrust law is a law with the dominant purpose of preserving competition between manufacturing, commercial or other business enterprises or preventing or repressing monopolies or restrictive practices in trade or commerce. There is no antitrust law in Hong Kong, nor any requirements in Hong Kong that joint venture agreements which prevent or distort competition or impose restrictions of one sort or another on the parties concerned require registration: *Halsbury's Laws of Hong Kong*, Vol 20, Partnerships and Joint Ventures [290.253]. Although there are no antitrust law in Hong Kong, many Hong Kong SAR air services agreements are subject to the antitrust law in the jurisdiction of the bilateral partner: *Halsbury's Laws of Hong Kong*, Vol 4, Civil Aviation [85.056] note 3. See also **Cartel**; **Restrictive trade practices**; **Sherman Act 1890**.

Anton Piller order An ex parte interlocutory mandatory injunction, first used in cases involving bootleg copies of musical records and tapes. It compels a defendant to permit the plaintiff to inspect the defendant's premises for the purpose of discovering and removing any material relevant to the plaintiff's case. It is made where there is a strong prima facie case, actual or potential damage to the plaintiff is very serious, and the defendant possesses vital material which might be destroyed. It is named after the decision in *Anton Piller KG v Manufacturing Processes Ltd & Ors* [1976] Ch 55 (CA). Also known as 'Anton Piller injunction'. For general principles in applying for an Anton Piller order, see *Peter Oswald Scales & Anor v William H H Wang and Anor* [1983] HKLR 110. See also **Ex parte injunction**; **Interlocutory injunction**; **Mandatory injunction**.

Apology An expression of regret for the publication of defamatory material coupled with an unqualified acknowledgement of the falsity of the statement and an offer to withdraw it. An apology could be a sincere expression of regret or mere admission of guilt: *Hung Yuen Chan Robert v Sing Tao Ltd & Anor* [1996] 4 HKC 539 (HC). Damages should not be reduced on account of what the defendants said, especially if/when the apology was so late as to be practically worthless and when one considered the conduct of the defendants up to that time: *Chan Kwong Wai v Lo Sau King & Ors* [1963] HKLR 692. The court should only impose an order of apology on an unwilling and unrepentant defendant in rare circumstances, but in such cases the court should adjust the damages awarded to reflect the refusal to give an apology: *Ma Bik Yung v Ko Chuen* [2000] 1 HKC 745 (CA). See also **Defamation**; **Mitigation**; **Offer of amends**; **Retraction**.

Apparent alteration A change to the text of a negotiable instrument, which is apparent upon inspection. Where a material alteration to the instrument is not apparent, a holder in due course may use it as if it was unaltered, enforcing payment according to its original terms: Bills of Exchange Ordinance (Cap 19) s 64(1). An alteration is 'apparent' where the party seeks to be bound can at once discern and point out to the holder of the note that it has been materially altered, although the alteration is not obvious to everyone: *Leeds Bank v Walker* (1883) 11 QBD 84. However, an alteration would be apparent if it would be observed and noticed on reasonable scrutiny by an intending holder: *Wollatt v Stanley* (1928) 138 LT 620. The proviso in s 64(1) is inserted for the benefit of a holder in due course, but the onus of proving that an alteration is not apparent rests on the holder. See also **Holder in due course**; **Material alteration**; **Negotiable instrument**.

Apparent authority A clear and unequivocal representation that an agent has certain authority to act on behalf of the principal. The content of this representation is the agent's apparent authority. It is the authority which the agent is represented as having and which the principal is estopped from denying. A representation by the agent that he has authority could not create apparent authority unless the principal could be regarded as having in some way instigated, or permitted, or put the agent in a position where he appears to be authorised to make it: *Re Swiftway International Ltd* [2000] 1 HKLRD C7. To establish apparent authority, certain conditions must be satisfied: *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 1 All ER 630, 2 QB 480 (CA); *Chan Kay (t/a Hing Lee Timber Co)(A Firm) v Shing Lee Engineering Co Ltd & Standard Regent Engineering (Third Party)* [1999] 3 HKLRD 12. The common example of apparent authority is the usual authority attached to a certain position which the principal has permitted the agent to assume. To that extent, apparent authority may exceed actual authority. This often occurs as a result of the principal's unannounced withdrawal of part

the sentence which would otherwise be appropriate: *R v Lau Ying Wai* (CACC 113/86, unreported). A maximum of two-third discount could be given to a supergrass: *R v Chan Fu Kui* [1986] HKLR 967 (CA); *R v Lau Yau Yuen* [1991] 2 HKLR 278 (CA). The rationale of the discount is to encourage other persons to assist in a similar manner: *Chan Wai Keung v R*, *supra*. See also **Discount of sentence; Informer; Supergrass**.

Assisted dispute resolution A term used to comprehend all legal methods by which disputes may be resolved, without suggesting that such methods are alternatives to the formal legal system. See also **Alternative dispute resolution; Commercial dispute resolution; Conciliation; Mediation; Negotiation**.

Assize *OF* - to sit down, settle, or assess. 1. A term originating in early medieval times denoting a legislative or judicial body of knights or freemen assembled to determine laws and disputes. The term later came to refer to the actions available in the assize, for example the Grand Assize or the possessory assizes. This term was once used in earlier times in Hong Kong to refer to the annual sessions in which the courts sat and thus the opening of the legal year was then known as the opening of the assizes.

Associate *Lat* - associates; joined to. A person or entity related to or connected with another. A person or entity may be an associate to another in various legal contexts:

Bankruptcy In bankruptcy, a natural person (eg spouse or relatives), partnership, trust, or private company associated with a bankrupt in the ways mentioned in the Bankruptcy Ordinance (Cap 6) s 51B. See also **Associate; Associated company; Bankrupt; Trustee in bankruptcy**.

Corporations A person or corporation related to or connected with another. A person or corporation may be an associate of another in various legal context and there is no universal definition of 'associate' which has different meanings ascribed to it by different legislation: Code on Takeovers and Mergers, Rules Governing the Listing of Securities, the Securities and Futures Commission Ordinance (Cap 24), Leveraged Foreign Exchange Trading Ordinance (Cap 451), Securities (Insider Dealing) Ordinance (Cap 395). However, the term may be summarised as follows: in relation to a person: (a) that person's spouse, brother, sister, parent or child; (b) any corporation of which that person is a director or controls the composition of the board of directors or holds, either alone or together with his spouse or minor child, the controlling shareholding; (c) any corporation accustomed or obliged to act, or whose directors are accustomed or obliged to act, in accordance with the directions of the person; (d) any person who is an employee or partner of that person; (e) the trustee of a trust of which the person, his spouse, minor child, is a beneficiary or a discretionary object. In relation to a corporation: (a) any director of that

corporation; (b) any related corporation of that corporation; (c) any director or employee of any such related corporation. See also **Associated company; Entitlement to shares; Takeover**.

Legal practitioners A person who is employed or paid in connection with a solicitor's practice. Also known as 'assistant solicitor'. It is a professional misconduct for a solicitor to have as an associate a person who has been disqualified from legal practice or have been convicted of an indictable offence: Legal Practitioners Ordinance (Cap 159) s 53. See also **Private practice; Solicitor's fidelity fund; Trust money**.

Taxation and revenue In relation to a person, it means: (a) where the person is a natural person, a relative of the person; a partner of the person and any relative of that partner; a partnership in which the person is a partner; any corporation controlled by the person, by a partner of the person or by a partnership in which the person is a partner; any director or principal officer of any such corporation; (b) where the person is a corporation, any associated corporation; any person who controls the corporation and any partner of such person, and, where either such person is a natural person, any relative of such person; any director or principal officer of that corporation or of any associated corporation and any relative of any such director or officer; any partner of the corporation and, where such partner is a natural person, any relative of such partner; (c) where the person is a partnership, any partner of the partnership and where such partner is a partnership any partner of that partnership, any partner with the partnership in any other partnership and where such partner is a partnership any partner of that partnership and where any partner of, or with, or in any of the partnerships mentioned in this subparagraph is a natural person, any relative of such partner; any corporation controlled by the partnership or by any partner thereof or, where such a partner is a natural person, any relative of such partner; any corporation of which any partner is a director or principal officer; any director or principal officer of a corporation: Inland Revenue Ordinance (Cap 112) 21A.

Associate director In company law, a person appointed as a director, usually with more limited powers and duties than other directors. An associate director is often a junior executive of a company. Such a director is often appointed to act in an advisory capacity because of his or her expertise in a particular area. See also **Director; Director's duties**.

Associated company A body corporate linked with another body corporate in terms of control of operations. For example, one company may be associated with another if certain types of agreements exist between the two bodies or if the companies are acting in concert. More generally companies may be considered to be associated when one company holds 20% or more of the equity voting rights of the other company. See also **Associate**.

Associated defendant See **Co-accused**.

Association Any group of persons who have agreed to join together in pursuit of one or more common objects or purposes: *Smith v Anderson* (1880) 15 Ch D 247. An association of persons, whatever its nature or objects, comes within the meaning of 'society' under the Societies Ordinance (Cap 151). Traditionally, 'association' refers to voluntary non-profit organisations promoting religious, educational, literary, scientific, artistic, and other similar purposes, involving benefits to the general community as well as to association members. The term also includes companies, partnerships, and business associations, but excludes building societies, co-operatives, credit unions, and friendly societies. See also **Club; Company; Co-operative society; Credit union; Partnership; Voluntary non-profit association**.

Association, memorandum of See **Memorandum of Association**.

Association of South East Asian Nations *Abbr* - ASEAN. An association of South East Asian Nations which was formed in 1967 to promote regional cooperation. Based in Jakarta, ASEAN has as its goals the accelerations of economic growth, cultural development and social progress, the promotion of collaboration and mutual assistance in matters of common interest, and the continuing stability of the South East Asian region: ASEAN Declaration 1967 arts 1-7. ASEAN comprises 9 nations: Brunei Darussalam, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. Cambodia has applied for membership and yet to be approved.

Assumption of risk, voluntary See **Voluntary assumption of risk**.

Assurance 1. A conveyance or other instrument by which an estate in land is disposed of, otherwise than by will. 2. In insurance, a contract between the insurer and the insured, in which the former, in consideration of money paid by the insured (a premium), indemnifies him against any loss resulting to him on the happening of certain events. The policy is the document containing the terms of the contract and 'assurance' and 'insurance' are generally considered interchangeable terms with no legal distinction being drawn between them. See also **Assured; Conveyance; Devise; Disclosure; Estate; Insurance; Insurance contract; Life insurance; Materiality; Uberrimae fidei**.

Assurance of personal chattels A secured transaction in which personal chattels represent the security interest and in which the transfer of legal title usually takes place in favour of the lender or chargee. In many jurisdictions, such transactions require registration under the relevant personal property security legislation: Bills of Sale Ordinance (Cap 20) s 9. See also **Bill of Sale**.

Assured 1. A person (often referred to as an 'insured') who has been insured by an insurer, or underwriter, whereby the former agrees to pay money (a premium) to the latter for insurance against loss. A contract of insurance between an insurer and an insured. 2. The assured is under an obligation, even if not formally requested by the insurer, to disclose every material circumstance that is known, or ought to be known, about the thing being insured. See also **Disclosure; Insurance contract; Insurer; Materiality; Uberrimae fidei**.

Asylum The right to seek asylum in another country from persecution based on political grounds: Universal Declaration of Human Rights 1948 art 14. The right to grant asylum belongs to the state concerned which may admit into its territory 'such persons as it deems desirable, without giving rise to complaint by any other state': United Nations Declaration on Territorial Asylum 1967 art 1. The humanitarian character of asylum is based on the 'elementary consideration of humanity': *Asylum case (Colombia v Peru)* 1950 ICJ 266; *Corfu Channel case (UK v Albania)* 1949 ICJ 4. A person granted asylum cannot be taken by his or her country of nationality or another state attempting to exercise jurisdiction over him or her for a particular cause of action. An alien has no inherent right to claim asylum and most states have voluntarily limited their right to offer sanctuary or refuge by entering into international extradition treaties. The Convention Relating to the Status of Refugees 1951 provided that unauthorised entry of refugees shall not be expelled or returned if their lives or their freedom would by that means be threatened: art 33. These provisions go some way toward securing a true individual right of asylum, but establish no right of entry. See also **Alien; Diplomatic relations; Extradition treaty; Refugee**.

Asylum state A state offering asylum to individuals, whether they be refugees, criminals, or debtors. States have a right under international law to offer sanctuary, protection, or refuge to individuals: Declaration on Territorial Asylum 1967 UN GA Res 2312 (XXII). See also **Asylum**.

At a discount At a price lower than par value; lower than normal.

At a premium At a price higher than par value; higher than normal.

At and from A term in marine insurance in which the policy of insurance provides that where a ship or goods are safely stored at the time the contract is concluded, the risk of loss attaches immediately therein and not when the ship starts on the voyage which has been insured. However, there may be an implied condition by statute that the 'adventure' or voyage commences within a reasonable time and if not so commenced, the insurer may avoid the contract: Marine Insurance Ordinance (Cap 329) ss 25, 42. See also **Marine insurance policy; Risk**.

Executive Council, the Legislative Council, and the Judiciary. The power of interpretation of the Basic Law is vested in the Standing Committee of the National People's Congress: Basic Law art 158. The Hong Kong courts may interpret on their own, in adjudicating cases, the provisions which are within the limits of the autonomy of the Hong Kong SAR. However, if the courts need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Hong Kong SAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee. The courts of the Hong Kong SAR shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. After the Court of Final Appeal delivered its judgments in the right of abode cases of *Ng Ka Ling (an infant) & Ors v Director of Immigration* [1999] 1 HKC 291 and *Chan Kam Nga (an infant) & Ors v Director of Immigration* [1999] 1 HKC 347 on 29 January 1999, the Standing Committee of the National People's Congress (NPCSC) adopted the Interpretation by the Standing Committee of the National People's Congress of the Basic Law arts 22(4), 24(2)(3) on 26 June 1999. The Court of Final Appeal in Hong Kong, in a later case, held that the NPCSC had power to make the Interpretation of 26 June 1999 and the courts in the Hong Kong SAR are under a duty to follow: *Lau Kong Yung (An Infant) & Ors v Director of Immigration* [1999] 4 HKC 731 (CFA).

Basis In a futures market, the spread (difference) between the spot (cash) price and the price of near futures contract in a commodity or distant futures. See also **Futures**; **Futures contract**.

Basis clause A clause by which the insured agrees to the truth or existence of specific matters forming the basis of the insurance contract between the parties. The basis clause makes the correctness of the proposal for insurance a condition of the contract, and incorporates the insured's proposal into the contract. If the insured provides an incorrect answer, whether fraudulent, negligent or innocent and whether the answer is material or not, the insurer can avoid liability: *Dawsons Ltd v Bonnin* [1922] 2 AC 413 (HL). See also **Insurance contract**; **Warranty**.

Basis point The basic unit used in measuring market movements of interest rates or the rate of yield to maturity on bonds and other debt securities. 'Basis point' refers to hundredths of 1% yield (0.01%). Fixed income yields vary often and the basis point scale is used to express these changes. For example, when the yield has been increased from 12.83% to 12.88%, it can be expressed as a 5 basis points increase. See also **Bond**.

Basis risk The possibility that an imperfectly matched hedge could produce a loss by the deviation of the basis from its predicted value. See also **Basic**; **Bond**.

Bastard See **Illegitimate child**.

Bastardise The act of declaring a person to be a bastard or illegitimate. The common law is against the bastardisation of a child because there is a strong presumption of legitimacy of those born in wedlock and such a presumption could only be rebutted on a proof beyond reasonable doubt: *Preston-Jones v Preston-Jones* [1951] AC 391, 1 All ER 124 (HL). However the common law position has since been modified by legislation and the presumption of legitimacy is now rebuttable on a balance of probabilities: Parent and Child Ordinance (Cap 429) s 5(2). See also **Adultery**; **Illegitimate child**; **Legitimation**; **Presumption of legitimacy**.

Battery Physical interference with another person.

Criminal law The reckless or intentional application of force to another person without consent, lawful excuse, or justification: *DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182 (HL). The force must be directly applied to the person: *Fagan v Metropolitan Police Cmr* [1968] 3 All ER 422, [1969] 1 QB 439. A battery can be a continuing act, so that a lawful touching may become unlawful: *Fagan v Metropolitan Police Cmr, supra*. Touching in the ordinary course of life would not be a battery because it would not be accompanied by the required state of mind or hostility: *Collins v Wilcock* [1984] 3 All ER 374, 1 WLR 1172. Consent could be a defence to battery: *R v William Ryan Erisman* [1988] 1 HKLR 370 (HC). The act constituting the battery and the state of mind required must coincide in time: *Fagan v Metropolitan Police Cmr, supra*. This offence is now known as 'assault', although the common law originally viewed assault and battery as two separate offences: Offences Against the Person Ordinance (Cap 212) s 40; *R v Taylor and Little* [1992] 1 All ER 259, 95 Cr App Rep 28. See also **Assault**; **Recklessness**.

Tort A trespass to the person consisting in an intentional act that directly causes a physical interference with the body of the plaintiff, without lawful justification or the plaintiff's consent. The defendant must intend to apply force against the plaintiff, but need not intend to harm or injure the plaintiff. It may be effected through other means, for example, by shooting the victim with a gun: *Pursell v Horn* (1838) 8 Ad & El 602. A hostile motive is generally not required but in cases of trivial interference it helps to establish the absence of the plaintiff's consent. A battery is actionable *per se* (without proof of damage): *Collins v Wilcock* [1984] 3 All ER 374, 1 WLR 1172. See also **Assault**; **Intentional act**; **Trespass to the person**.

Battle of forms The process of exchanging documents of differing terms by parties in pre-contractual negotiations, the documents constituting offers and counter offers. The battle of forms does not create a contract until the last counter-offer is unconditionally accepted expressly or impliedly: *Butler Machine Tools Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 All ER 965, 1 WLR 401. See also **Acceptance**; **Contract**; **Counter offer**; **Offer**.

Bay An area of water where, using a line drawn across its mouth (a 'closing line') as the diameter to form a semi-circle on the seaward side, and considering islands to be water, is greater in area on the landward side: United Nations Convention on the Law of the Sea 1982 art 10(1); Geneva Convention on the Territorial Sea and Contiguous Zone (Territorial Sea Convention) 1958 art 7(1). For the indentation to be legally considered as a bay, the closing line must not be greater than 24 nautical miles: United Nations Convention on the Law of the Sea 1982 art 10(2); Territorial Sea Convention 1958 art 7(2). The closing line is considered to be a baseline so the waters on the landward side are internal waters: United Nations Convention on the Law of the Sea art 8(1); Territorial Sea Convention 1958 art 5(1). A state may claim sovereign rights over a 'historic bay' with the approval of other interested states by claiming a historic right vested in it by virtue of long use: United Nations Convention on the Law of the Sea 1982 art 7(6). Historic bays are governed by customary international law: United Nations Convention on the Law of the Sea 1982 art 10(6). A bay may be divided between two fronting states by following a median line drawn between their respective baselines: Declaration of the Government of the People's Republic of China on Territorial Sea: Promulgation of National Laws (No 2) 1997 (Cap 2403); Promulgation of National Laws 1998 (Cap 2404); McDougal & Burke *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, 1962) pp 327-76. See also **Baseline**; **Customary in international law**.

Bear A term used in various markets to refer to a person who believes that security or commodity prices will decline, and who accordingly sells on that expectation, as distinguished from a 'bull'. If a bear possesses the securities which he is selling, he is a 'covered' or 'protected' bear. 'Uncovered' bears are short sellers, ie selling shares or commodities or currency which he does not possess, in anticipation of a decline in price at which they can buy back (cover) at a profit. Market pessimists who take the view that market or business conditions are growing worse are also referred to as bear. See also **Bear market**; **Bull**; **Securities**.

Bear market 1. A market where share prices are falling because shareholders are selling since they

believe the prices will fall further. 2. An expression used to describe the stock market when the influence of the bears is predominant and the trend of prices is downward, more particularly a market in which the downward tendency has been prolonged or expected to be prolonged, over a considerable period of a year or more. See also **Bear**; **Bull market**.

Bear spread A strategy used by dealers in futures markets involving buying a nearby contract and selling a deferred contract to take advantage of the declining market.

Bear straddle A strategy used by dealers in futures markets involving selling contracts of nearby months while buying contracts of distant months. See also **Butterfly spread**; **Option**; **Straddle option**; **Trading spread**.

Bearer The person in possession of a bill or note that is 'payable to bearer': Bills of Exchange Ordinance (Cap 19) s 2. A bill may be payable to the bearer in its origin or become so by an indorsement in blank: ss 8(3), 34(1). See also **Bearer bill**; **Bearer debenture**; **Cheque**; **Indorsement in Blank**; **Negotiable instrument**.

Bearer bill A bill expressed to be made 'payable to bearer'. For example, bills that are expressed 'pay Jones or Bearer', 'pay bearer' or 'pay cash or bearer', are bills of exchange made payable to bearer. A bill on which the only or last indorsement is an indorsement in blank is payable to the bearer: Bills of Exchange Ordinance (Cap 19) s 8 (3). See also **Bearer**; **Bill of Exchange**; **Indorsement**; **Indorsement in blank**; **Order bill**; **Payee**.

Bearer bill of lading A bill of lading used where the goods are deliverable to the bearer of such bill. See also **Bill of Lading**; **Order of bill of lading**.

Bearer debenture A debenture which is expressed to be payable to its bearer, ie marked 'pay bearer'. A bearer debenture may be transferred by delivery without advising the issuing company: *Edelstein v Schuler & Co* [1902] 2 KB 144. Being a negotiable instrument, a bearer debenture is transferrable by delivery, so as to pass the property in it to a holder for value in good faith, and to entitle him, upon delivery of it to the company, to obtain payment of the principal secured when due, and to sue in his own name upon the debenture: *Halsbury's Laws of Hong Kong*, Vol 6, Companies and Corporations [95.0509]. No register of ownership is kept by the issuing company. It can be transferred from one person to another without registration.

Bearer instrument See **Bearer**.

Bearer of a bill See **Holder of a bill**.

Brother A male sibling; a male who has the same parent as another person. Sometimes, such a male person is called a 'brother of the whole blood', in contrast to a 'brother of the half blood' or more commonly, a 'half brother'. Succession by brother of the half blood or of the whole blood: *Intestates' Estates Ordinance* (Cap 73) ss 4(4), 5(4), sch 1, para 2(3); *Inheritance (Provision for Family and Dependents) Ordinance* (Cap 481) s 3(1)(viii). Brother may include step-brother. See also **Father**; **Mother**; **Sibling**.

Brother-in-law The male sibling of one's spouse; or the husband of one's sister. The term is also commonly used in relation to de facto relationship connections, for example, it is included in 'member of the family' in the *Employees' Compensation Ordinance* (Cap 282) s 3. See also **Contact order**; **De facto**; **Uncle**.

Browne v Dunn, rule in The rule that during cross-examination, counsel is obliged when cross-examining to provide the witness with the opportunity to deny the evidence of counsel's own witnesses. A failure to cross-examine a witness on the evidence of that witness may be taken as an admission of the truth of that evidence: *Browne v Dunn* (1894) 6 R 67; *R v Hart* (1932) 23 Cr App R 202 (CA). If it has been made plain in some other manner that the testimony of a witness who it is suggested should be disbelieved is challenged, it is not necessary to put questions in cross-examination: *R v Ho Shu Chung* [1990] 1 HKLR 180 (CA); *R v Wong Hing Tong* (CACC 45/93, unreported) See also **Cross-examination**.

Bucketing A dishonest practice of a broker involving non-execution of client's orders on a recognised stock or futures market, or, where the securities are bought or sold through offshore or dummy accounts to create the illusion that they are validly executed, but in fact no securities are bought or sold. The broker normally takes a position in the market opposite that of the client. When the prevalent attitude of the amateur speculator is that of a bull, the broker would take a bear position. A firm of brokers of this kind is called a 'bucket shop'. It is a place where the broker bets against the client without his consent and dealings are in profits and losses rather than in the securities themselves. The practice of the bucket shop also involves misleading its clients and accepting inadequate margins.

Buggery The sexual intercourse per anum by a man with a man or a woman: *R v Barron* [1914] 2 KB 570 (CCA). Consent is no defence to buggery. The common law offence of buggery was abolished in Hong Kong in 1991 and substituted by various offences relating to buggery: *Crimes Ordinance* (Cap 200) s 118A-118F, 118M. See also **Gross indecency**.

Bugging Placing and using a secret listening device to intercept conversations without permission. Evidence

obtained by a bugging device which had been installed as a result of a trespass to a private premises is admissible subject to the court's discretion to exclude it either because of unfairness or because of the fact that the prejudicial effect of the evidence outweighed its probative value: *R v Khan (Sultan)* [1996] 3 All ER 289, 3 WLR 162, [1997] AC 558 (HL). Bugging may not be covered by the *Interception of Communications Ordinance* (Cap 532). There has been legislation in the special areas of bugging, and telephone taping and storage of personal data, which allows an individual compensation for damage, including injury to feelings caused by contravention of the legislation: *Personal Data (Privacy) Ordinance* (Cap 486) s 66. See also **Listening device**.

Builder See **Contractor**.

Builder's certificate In relation to a ship, a certificate signed by the builder of the ship and containing a true account of certain prescribed information: *Merchant Shipping (Registration) Ordinance* (Cap 415) s 2.

Building Generally, a substantial structure or edifice with a roof and walls.

Building and construction A structure of considerable size, and intended to be permanent, or at least to endure for a considerable time: *Stevens v Gourley* (1859) 7 CBNS 99, 141 ER 752; *Leicester Corp v Brown* (1892) 62 LJMC 22 (DC). The meaning to be attached to the term 'building' will depend upon the context: *Winland Investment Ltd v Apesole Ltd* [1986-88] CPR 199, [1989] 1 HKLR 541 (HC). It does not include an illegal structure for the purposes of the *Building Ordinance* (Cap 123): *Building Authority v Owners of Illegal Structures on the Roof of 9/F and Roof Above Flats A1 and A2 on 10/F 105 Austin Road, Pak On Building, Kowloon (KIL 2302)* [1987] 2 HKC 413 (DC). The whole, or any part, of any domestic or public building or building which is constructed or adapted for use for public entertainment, arch, bridge, cavern adapted or constructed to be used for storage of petroleum products, chimney, cook-house, cowshed, dock, factory, garage, hangar, hoarding, latrine, matshed, office, oil storage installation, out-house, pier, shelter, shop, stable, stairs, wall, warehouse, wharf, workshop or tower, sea-wall, breakwater, jetty, mole, quay, cavern or any underground space adapted or constructed for occupation or use for any purpose including its associated access tunnels and access shafts, pylon or other similar structure supporting an aerial ropeway and such other structures as the *Building Authority* may by notice in the *Gazette* declare to be a building: *Buildings Ordinance* (Cap 123) s 2. It also means any building which contains any number of flats comprising two or more levels, including basements or underground parking areas: *Building Management Ordinance* (Cap 344) s 2. It includes any incomplete

building whatever its stage of construction: *Airport Authority Ordinance* (Cap 483) s 2. See also **Environmental planning**; **Fixture**.

Insurance The description of building is usually stated in details in the schedule attached to the insurance policy. Whether a structure constitutes a building is a question of fact and degree: *Lavy v London Country Council* [1895] 1 QB 577. Its ordinary meaning is an enclosure of brick or stone work, covered in by a roof: *Moir v Williams* [1892] 1 QB 264.

Intellectual property In copyright law, it includes any fixed structure, and a part of a building or fixed structure: *Copyright Ordinance* (Cap 528) s 5. See also **Artistic work**; **Copyright**.

Building appeal See **Building Appeal Tribunal**.

Building Appeal Tribunal A tribunal to hear and determine appeals by any persons aggrieved by decisions made by the *Building Authority*: *Buildings Ordinance* (Cap 123) ss 43-53D.

Building Authority The Director of Buildings who is responsible for administering and enforcing the *Buildings Ordinance* to ensure compliance with statutory standards of safety and health for private buildings and building works: *Buildings Ordinance* (Cap 123).

Building code A set of technical standards or codes of practice for the design and construction of buildings and other structures. Generally, they do not have statutory effect, although a party may be required by contract to design or to provide materials and/or services in accordance with certain codes. In Hong Kong, building codes published by the *British Standards Institute* are widely used in the construction industry. Hong Kong also has its own codes published by various government departments such as the *Building Department* to cover aspects of building design which are peculiar to Hong Kong such as wind design.

Building contract A contract in which one person (the contractor) agrees to perform building or engineering works for another (the proprietor or employer). In modern building contracts, there are many different types of delivery systems, involving arrangements with subcontractors and suppliers. A building contract is often formed by a tender process; its terms are usually contained in a number of documents, including the formal instrument of agreement, conditions of contract, specifications, drawings, schedule of rates, and the bill of quantities. Building contracts have attributes of contracts for the supply of goods and of contracts for services. They are therefore contracts for work and materials. A building contract has been defined as 'an entire contract for the sale of goods and work and labour for a lump sum payable by instalments as the goods are delivered and the work is done': *Gilbert-Ash*

(*Northern Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, 1 Build LR 73, [1974] AC 689 (HL)). A building contract may comprise the agreement itself, the conditions, the drawings, the specifications, a bill or bills of quantities, schedules of rates or prices for the valuation of the works, a programme or method statement for the order or manner in which the works may or will be carried out. See also **Bill of quantities**; **BOT contract**; **Delivery system**; **Subcontract**; **Supplier**; **Tender**.

Building controls The controls by which the government has by statute and regulation sought to impose standards on building works. In Hong Kong, this is principally administered under the *Buildings Ordinance* (Cap 123) and its subsidiary legislation. These standards are directed towards the objective of ensuring that buildings are safe from failure and fire, that they present no hazard to their occupants or adjoining property, and that they are designed and constructed in such a way as to protect the health, comfort, and general welfare of those using them and the community in general. In addition to prescribing standards for buildings, the legislation also makes provision for administration and enforcement of building controls by the relevant government departments. See also **Building contract**; **Building law**.

Building law The body of legal principles relating to the construction of structures on land. Building law can be seen as a particular manifestation of the law relating to the provision of services and labour. A feature of building law is that the structure is ultimately fixed on land so that title passes to the proprietor of the land by operation of law: *Appleby v Myers* (1867) LR 2 CP 561. Also known as 'construction law'. See also **Building contract**; **Proprietor**.

Building lease A lease of land that contains as one of its covenants an obligation to build on the land, that is, a building covenant. If a lease is intended to be a building lease but does not contain a covenant to build, it is invalid as a building lease although it will still be valid as an ordinary lease: *Hallet v Martin* (1883) 24 Ch D 624. This obligation requires new construction (that is, either erecting a building on vacant land or pulling down old buildings and erecting new ones on the site), and so differs from an obligation to repair: *City of London v Nash* (1747) 3 Atk 512, 26 ER 1095, 3 Atk 512; *Jones v Verney* (1739) Willes 169. This term is not commonly used in Hong Kong where all land is vested in the Government and leases of land, usually containing a covenant to build or develop the land, are granted by the Government to private developers. The policy behind building covenants in Hong Kong is that building land must be used expeditiously and in a particular way when released by the Government due to its scarcity: *Shun Shing Investment Co Ltd v A-G* [1983] HKLR 432 (HC). Government leases come in different forms, for example,

adopts the International Covenant on Civil and Political Rights and provides for legal protection of the civil and political rights set out in the Covenant. See also **International Covenant on Civil and Political Rights 1966**.

Civil aviation All matters relating to aviation not exclusively linked with aircraft used in military, customs or police services. In addition to aviation conducted by private individuals and public corporations, it includes the aviation activities of Hong Kong in which such activities take place for commercial purpose. See also **Aviation**.

Civil aviation regulations Regulations made under the Civil Aviation Ordinance (Cap 448) governing civil aviation matters. They are: Air Transport (Licensing of Air Services) Regulations (Cap 448A), Hong Kong Civil Aviation (Investigation of Accidents) Regulations (Cap 448B), Air Navigation (Hong Kong) Order 1995 (Cap 448C), Hong Kong Air Navigation (Fees) Regulations (Cap 448D), Air Navigation (Flight Prohibition) Order (Cap 448E) and Civil Aviation (Insurance) Order (Cap 448F). See also **Civil aviation**.

Civil aviation safety authority See **Aviation Security Authority**.

Civil ceremony See **Civil marriage**.

Civil contempt A form of contempt of court involving disobedience by a party to a civil action of a specific order made on him in that action. Civil contempts are punished at the request and for the sole benefit of the other party to the civil action. Civil contempt bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but between the party in the default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest: *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] 1 Ch 195; *Pappadis v Chan Shing Sheng Barry* [1989] 2 HKC 369. The administration of justice would be undermined if the order of any court of law could be disregarded with impunity; but no sufficient public interest is served by punishing the offender if the only person for whose benefit the order was made chooses not to insist on its enforcement: *A-G v Times Newspapers Ltd* [1974] AC 273, [1974] 3 All ER 54. Also known as 'contempt in procedure'. See also **Contempt of court**; **Criminal contempt**.

Civil debt Debts due to the Government or public authorities and stipulated by statute to be recovered in the courts. With the exception of proceedings by the Government for the recovery of any tax or duty or interest thereon or to two categories of forfeiture proceedings, the limitation periods specified in that

Ordinance apply in general to proceedings by or against the Government in like manner as they apply to proceedings between ordinary persons: Limitation Ordinance (Cap 347) s 37. It is however correct that the Hong Kong SAR courts will not assist governments from outside the Hong Kong SAR in recovering a taxation debt: *Government of India v Taylor* [1955] AC 491. See also **Debt**.

Civil disobedience Action on the part of citizens in protest against laws regarded by them as unjust. Examples may be refusing to pay taxes, or breaching regulations pertaining to public meetings or public processions. Questions about what (if any) civil disobedience is permissible are related to the jurisprudential debate over whether or not an unjust law is in fact a law and also whether a citizen's obligation to obey the laws of his community is unqualified. See also **Civil liberties**; **Human rights**.

Civil law 1. It deals with the rights, duties and remedies of individuals towards each other. 2. It is defined in the Justinian's Institutes as 'that law which every people has established for itself'; in other words, the law of any given state. It is now more properly called municipal law. The term civil law applies to the Roman civil law. 3. A term formerly used to distinguish the system of jurisprudence held and administered in the Roman empire from the common law of England and the canon law regulating the government of ecclesiastical institutions. 4. In Western Europe, a system of codified laws as distinct from the body of precedents developed and evolved from the common law. See also **Canon law**; **Common law**; **Corpus juris**.

Civil liberties The liberties conferred on a citizen by a state. Civil liberties are distinguished from human rights which are the prerogative of citizens and non-citizens alike. The American civil liberties movement was concerned with the equal conferral of civil liberties upon citizens, regardless of racial backgrounds. See also **Civil rights**.

Civil marriage A marriage solemnised otherwise than according to the rites or customs of a religion that complies with the Marriage Ordinance (Cap 181). Also known as 'civil ceremony'. See also **Chinese customary marriage**.

Civil proceedings Claims or actions commenced and to be heard in the civil jurisdiction of the court of law, as distinct from criminal proceedings taken in the criminal jurisdiction of a court. See also **Action**.

Civil redress The remedy afforded by law to a private person in a civil court when their private rights have been infringed. Civil redress may be distinguished from the redress obtained through criminal proceedings.

Also known as 'civil remedy'. See also **Civil proceedings**; **Remedy**.

Civil remedy See **Civil redress**.

Civil rights The rights which a citizen or resident enjoys by virtue of a constitutional provision or a specific ordinance. The rights are 'civil' because they are a privilege of citizenship or residency. In this respect, civil rights differ from human rights which are not predicated upon citizenship or residency in a certain state or region. Such rights cannot be exhaustively defined and can only be ascertained by an inductive approach; an example is the right to property: *Ma Wan Farming Ltd v Chief Executive in Council & Anor* [1998] 2 HKC 190; [1998] 1 HKLRD 514. See also **Civil and political rights**; **Civil liberties**; **Human rights**.

Civil servant See **Public servant**.

Civil service See **Public service**.

Civil war Armed conflict between members of the same state or political entity. Civil war can be carried on by regular or partisan forces. It usually takes the form of large scale conflict between organised forces within the boundaries of the state or between the ruling government and insurgents. In international law, civil war is recognised only if other states accord all parties to the dispute the status of belligerents. See also **Belligerent**; **Insurgent**.

Civilian Any person not considered to be member of the armed forces of parties to a conflict, other than those civilians who spontaneously take up arms against an invading enemy: Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 art 50. See also **Armed forces**; **Civilian population**.

Civilian population Persons who are not members of armed or auxiliary forces, whether or not they are involved in warfare: International Committee of the Red Cross Draft Rules 1956 art 4. International legal rules protecting civilian populations are codified in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. The categories of persons protected by the establishment of security zones include the wounded, the sick, the handicapped, the pregnant, mothers with children under seven years, and all children under 15 years: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 art 14. The Convention also provides for the protection of civilian hospitals and the free shipment of provisions: arts 18, 23.

Claim 1. The assertion of a right or demand to a right to property or to a remedy, a cause of action, the grounds in pleadings upon which relief is claimed: *Read v Brown*

(1888) 22 QBD 128. A claim includes a proceeding before the tribunal between a claimant and a defendant: Labour Tribunal Ordinance (Cap 25) s 2; Small Claims Tribunal Ordinance (Cap 338) s 2. Also known as 'action', 'cause', 'cause of action' or 'matter'. 2. To assert. The term 'claim' has a broader meaning than the term 'admit', as the latter means 'to concede as true' only: *A-G v Ng Kwok Yuen* [1973-1976] HKC 326. Any person claims to be a member of a triad society shall be guilty of an offence: Societies Ordinance (Cap 151) s 20(2). A person may claim to be member of a triad society in answer to a question and the purpose or motive of making such a claim is immaterial: *A-G v Ng Kwok Yuen, supra*. See also **Action**; **Allegation**; **Cause of action**; **Claim for relief**; **Statement of Claim**; **Suit**.

Claim for contribution A claim by a party to a suit to recover a portion of his or her liability from another who is liable. Contribution is claimed by a defendant in joining a third party to the proceedings with a view to recovering a portion of liability from the third party on the basis that the third party is also liable for the loss of the plaintiff: Labour Tribunal Ordinance (Cap 25) s 26(2). Contribution can also be claimed between defendants to a proceeding. See also **Contribution**; **Indemnity**.

Claim for relief An assertion of rights by way of the options available at law, relief include damages and other equitable relief: *West Wake Price & Co v Ching* [1957] 1 WLR 45, [1956] 3 All ER 821. A claim for relief refers to a claim in equity: *Litton v Litton* (1876) 3 Ch D 793. It may be thus used for such remedies as specific performance, injunction, or the reformation or rescission of a contract: *Nind v Nineteenth Century Building Society* [1894] 2 QB 226. See also **Cause of action**; **Complaint**; **Remedy**.

Claim of right A belief that a person is lawfully entitled to possess property in the possession of other. The appropriation of property belonging to another is not to be regarded as dishonest if the accused appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or a third person: Theft Ordinance (Cap 210) s 3(1)(a). A claim of right exists whenever a person honestly believes that he or she has a lawful claim, even though it may be completely unfounded in law or in fact: *R v Robinson* [1977] Crim LR 173; *R v Tsang Ming Hung* [1987] 1 HKC 147 (CA). The fact that he actually has no such right or has misunderstood the law is not relevant: *R v Ng Shui Sang & Ip Wai Hung* (HCMA 812/94, unreported). See also **Larceny**.

Class action Legal proceedings which allow the claims of many individuals against the same defendant, which arise out of the same or similar circumstances, to be conducted by a single representative: *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398. There are

jurisdiction: *Kendall v Hamilton* [1874-80] All ER Rep 932, (1879) 4 AC 504. See also **Decree**; **Judgment**; **Recognisance**.

Contract of sale A contract the main object of which is the transfer of the property in, and the delivery of the possession of, a chattel as such to the buyer: *J Marcel (Furriers) Ltd v Tapper* [1953] 1 WLR 49, 1 All ER 15. The courts seem inclined to deal with contracts of exchange or barter (where the consideration for the transfer consists of other goods or some other valuable consideration not being money) as analogous to contracts of sale. A contract of sale includes an agreement to sell as well as a sale: Sale of Goods Ordinance (Cap 26) s 2(1). It may be absolute or condition precedent for coming into existence: Sale of Goods Ordinance (Cap 26) s 3(2).

Contract of service A contract under which a person is engaged in the service of an employer to do such work as is contracted for and where the employer directs what is to be done. It differs from a contract for services, under which a person engages to perform work for another. If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it: *Massey v Crown Life Insurance Co* [1978] 2 All ER 576. When a person is under a duty to use care he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services: *Cassidy v Ministry of Health* [1951] 2 KB 343; *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd* [2000] 1 HKC 1 (CFA). See also **Contract for services**; **Contract of employment**; **Employee**; **Employment**; **Independent contractor**.

Contract under hand Contract executed by signature, as opposed to a contract executed under seal or by deed.

Contract under seal A contract expressed in an instrument under seal (that is, in the form of a deed). A contract made between private persons, if required by law to be in writing and under seal, may be made on behalf of the company in writing under its common seal. A contract so made binds the company and its successors and all other parties to it: Companies Ordinance (Cap 32) s 32. Contracts made on behalf of any body corporate wherever incorporated need not be under seal: Corporate Bodies Contracts (Cap 293) s 2. See also **Special contract**.

Contract unit The actual amount of a commodity which is the subject matter of a futures or option contract. See also **Option**.

Contracting out Terms expressly renounce or exclude the operation of certain statutory provisions that would otherwise affect the terms or performance of a contract. Contracting out is often prohibited, as it nullifies the benefits the statute is intended to confer. The contrary provision in the employment agreement to forfeit unused annual leave at the end of each year was regarded as to contract out rights, benefit or protection conferred upon an employee by the Employment Ordinance: *Archer v Hong Kong Channel Ltd* [1998] 1 HKC 307 (CA); Employment Ordinance (Cap 57) s 70. Save for express exception, any contract or agreement whereby an employee relinquishes any right to compensation from his employer for personal injury by accident arising out of and in course of his employment be null and void: Employees' Compensation Ordinance (Cap 282) s 31. See also **Disclaimer**; **Exclusion clause**; **Implied term**; **Limitation clause**.

Contracting state A state which has consented to be bound by a treaty, whether or not the treaty has entered into force: Vienna Convention on the Law of Treaties 1969 art 2. See also **Convention**.

Contractor A person who, in pursuit of an independent business, undertakes to do specific work for others, without submitting himself to their control in respect of the details of work. A contractor is therefore not an employee. In the building and construction industry, the contractor is the person or firm undertaking the work on his or its own account or pursuant to a contract for services or arrangement entered into with another person, including the Government or any public body. Where there is more than one contractor undertaking construction work at the site, if a contractor is the principal contractor undertaking work there, he is responsible for the site: reg 2(2)(a); *R v Tsui Wai Ping* [1993] 2 HKC 675; [1992-93] CPR 23. In modern complex projects, the principal contractor is the builder of the project. It does very little actual building but will subcontract the work to various subcontractors. Its task is to provide the finance and coordinate the work. As the contractor is not an employee, in tort, the employer cannot be held liable for any torts committed by the contractor. However, the employer may be liable for any negligence attributable to his personal fault or any liability imposed by statute: *Pinn v Rew* (1916) 32 TLR 451. See also **Subcontractor**; **Vicarious liability**.

Contractual appropriation In the sale of goods, property (or legal title) passes to the buyer when for example, they are placed on board the nominated vessel pursuant to the contract: *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240. This assumes that the goods have been appropriated to the contract and as such have been identified as part of the bulk shipment in accordance with the presumed intention of the parties: Sale of Goods Ordinance (Cap 26) ss 18-

20. See also **Appropriation**; **Company**; **Dividend**; **Loan**.

Contractual bailment 1. The delivery of personal property or goods by one person (the bailor) to another (the bailee) who holds them in trust for some specific purpose or object upon the basis of a contract between them, either express or implied. After the purpose has been fulfilled, the property is returned to the bailor or otherwise dealt with by the bailee according to appropriate instructions, or retained until it is reclaimed, as the case may be. 2. The bailor/bailee relationship imposes special duties and obligations on the person who takes possession of the bailor's goods: Pawnbrokers Ordinance (Cap 166) s 22. See also **Bailment**; **Lease**.

Contractual licence A licence granted under the terms of a contract to the licensee to occupy the land. Contractual licenses are subject to the same rules which govern all contracts. For example, a court will imply terms into a licence to give it business efficacy. If the licensee or licensor commits a breach of the terms of the contractual licence, this will entitle the other party to treat the licence as at an end and the other party may seek damages for breach of contract. A contractual licence creates no interest in land and such, the licence is not registrable under the Land Registration Ordinance (Cap 128). See also **Bare licence**; **Licence**; **Licence coupled with a grant**.

Contractual limitation periods 1. In general terms, the time period, *inter alia*, during which a cause of action arising from a breach of contract must be initiated and as such, runs from the day upon which the cause of action accrues: Limitation Ordinance (Cap 347) s 3. The period of limitation in these circumstances is six years (for actions founded on a simple contract or in tort) and is the norm in most common law jurisdictions. Hence, after the expiry of six years following the breach, any action will be barred although damage may have been occasioned by the plaintiff within six years of the action being brought: *Battley v Faulkner* (1820) 3 B & Ald 288, 106 ER 668. 2. Statutory, discretionary extensions or postponement of the limitation period are exercisable, for example, by disability or by acknowledgement or part payment: ss 22-25. Where the consequences of delay (in registering an interest in land) rendered the grant of relief unreasonable or unjust as the result of the Limitation Ordinance, then relief will be so granted: *Estate of Yang Sen Hui (deceased) v Pao Yuen Tung Hsing Yieh Co Ltd* [1982] HKC 81, [1983] HKLR 124 (CA). See also **Laches**.

Contractual rights Rights arising out of a contractual relationship. Contractual rights may be express (agreed to by the parties to the contract, such as the right to demand performance of the promisor's specified obligations) or implied (usually by operation of law, such as the right to terminate the contract upon the

other party's breach of a condition), and can arise at common law, in equity, or under statute. See also **Contract**; **Right**.

Contractual voyage The agreed route under a contract of affreightment. Where there is no specific route prescribed in the charterparty or bill of lading, it is presumed that the direct geographical route between the port of loading and the port of discharge is the contractual route: *Frenkel v MacAndrews* [1929] AC 545. See also **Charterparty**.

Contradictory statement on oath A statement sworn to be true on oath which is irreconcilably inconsistent with another statement made by the same person under oath on another occasion. Where there is such an inconsistent statement on a material matter, the maker may be prosecuted for perjury under the Crimes Ordinance (Cap 200) pt V. The defendant in a perjury may be convicted without the prosecution proving which of the irreconcilable statements is false. Giving contradictory statement on oath is an offence: s 39; *R v Poon Sau Tin* [1991] 1 HKC 68; *R v Chiu Heung Wah* [1993] 2 HKC 209. See also **Oath**; **Perjury**; **Sworn statement**.

Contrary intention An intention in legislation that the definitional meaning is not to apply in a particular context. The meaning of an expression in common use when used in an ordinance, unless a contrary intention appears, must be defined in the context of Interpretation and General Clause Ordinance (Cap 1): *Beaux Estates Ltd v A-G* [1983] 1 HKC 317. The burden of showing a contrary intention rests on the person alleging it: *Sin Poh Amalgamated (Hongkong) Ltd v A-G* [1963] HKLR 77 (FC). See also **Statutory construction**.

Contravene To breach, neglect, offend against or fail to comply with a requirement or prohibition. 'Contravene' in relation to any requirement or condition prescribed in any ordinance or in any grant, permit, licence, lease or authority granted under or by virtue of any ordinance includes a failure to comply with that requirement or condition: Interpretation and General Clauses Ordinance (Cap 1) s 3. A piece of legislation is said to have contravened the constitution if it is inconsistent with the provisions of the constitution. In Hong Kong, no law shall contravene the Basic Law: Basic Law art 11. See also **Contravention**.

Contravention An infringement or violation of a rule, standard or norm. In the legal sense, breach of a law, especially a failure to comply with the provision of a legislation: Interpretation and General Clauses Ordinance (Cap 1) s 3.

Contributing cause A general term used to describe any factor which contributes to a result. In the English law of tort, this term is seldom used. The more

design of the same. Also known as 'Turnkey contract'. See also **Building contract; Contractor; Design contract; Proprietor**.

Design contract In building and construction law, a contract to design. In such a contract, unless the circumstances indicate otherwise, there is a term implied by law that the designer will exercise reasonable skill and care in carrying out the design functions: *Voli v Inglewood Shire Council* (1963) 110 CLR 74, [1963] ALR 657. The term requires that the designer be aware of, and have regard to, applicable statutory requirements (*BL Holdings Ltd v Robert J Wood & Partners* (1978) 122 Sol Jo 525, 10 BLR 48), comply with applicable guidelines published by relevant professional institutions (*Carosella & Carosella v Ginos v Gilbert Pty Ltd* (1981) 27 SASR 515, 46 LGRA 51), provide advice as to any risks involved in the design or construction (*Victoria University of Manchester v Hugh Wilson & Lewis Womersley (A Firm)* (1985) 2 Con LR 43), review the design during the currency of the project and correct any deficiencies which may come to light: *University Court of the University of Glasgow v Whitfield* (1988) 42 BLR 66, 19 Con LR 111. Although a design contract is a personal one, the designer must, where the design involves matters of a specialist nature, seek assistance from persons with the appropriate matters: *Moresk Cleaners Ltd v Hicks* [1966] 2 Lloyd's Rep 338, 4 BLR 50. See also **Design; Design and construct contract**.

Design documents The documents for design registration filed with the Design Registry. The application has to be made on the specified form: Registered Designs Rules (Cap 522A) s 12(1). The applicant has to give the information and documents set out in the Registered Designs Rules (Cap 522A) s 12: s 6. See also **Design; Register of designs**.

Design right The intellectual property right of the owner of a registered design. It is a personal property and vested by the operation of law in the same way as any other personal property. The right may be assigned, mortgaged or licensed to a third party: Registered Designs Ordinance (Cap 522) s 32(1), (3). See also **Design; Obvious imitation; Registered design**.

Desk audit An audit which checks the tax returns of taxpayer. A desk audit is conducted by way of interview with the taxpayer. The taxpayer is requested to produce receipts or other documents to support disclosures in the taxpayer's tax return. Desk audit is contrasted with field audit which is conducted at the taxpayer's business premises by the officers of the Inland Revenue Department.

Destitute Without resources or means of support. In family law property proceedings, the court is required to take into account any fact or circumstance which the

justice of the case requires to be taken into account: Matrimonial Proceedings and Property Ordinance (Cap 192) s 7. Where an order is likely to leave a party destitute or homeless, the court will usually refuse to make the order: *In the Marriage of Mehmet* (1986) 10 Fam LR 1035. See also **Indigent**.

Désuétude *Fr* - disuse. The term applied to laws which are technically still in existence, but which have fallen into disuse.

Conflict of laws In international law, a discontinuance of, or agreement to discontinue, a treaty. Désuétude applies where all parties to a treaty conclude a later agreement inconsistent with the provisions of an earlier treaty. A treaty may also be terminated in effect by a party if the treaty is very old or of doubtful provenance. The Vienna Convention on the Law of Treaties 1969 does not recognise the principle of désuétude, and specifies that in the absence of a termination clause there is no unilateral right of termination or withdrawal from a treaty unless it can be established that the parties intended there to be such a right, or such a right can be implied from the nature of the treaty: Vienna Convention on the Law of Treaties 1969 art 56. See also **Treaty**.

Statutes The doctrine by which a statute which has been left unenforced over a sufficiently long period becomes obsolete and becomes deprived of legal force even though not formally repealed. This doctrine is not part of the common law, and so a statute continues in force until repealed however long the time may have been since it was known to have been actually enforced: *R v London County Council, ex p Entertainments Protection Assn Ltd* [1931] 2 KB 215.

Detection risk In a company audit, it refers to the risk that auditors' procedures will not detect a misstatement existed in an account balance or class of transactions. The auditors are usually required to perform some substantive procedures for material account balances and classes of transactions: *Statement of Auditing Standards 300 - Audit Risk Assessments and Accounting and Internal Control Systems* published by the Hong Kong Society of Accountants. See also **Control risk**.

Detention The keeping of persons or property in custody.

Education A teacher's power as delegate of the parental authority to punish a pupil extends to reasonable detention and restraint in the interests of school order and discipline. Detention is a form of punishment which has been customary over a long period of time, but when it is used a variety of factors should be borne in mind, for example, the age of the pupil and the problem of his travelling home alone at an unusual hour: *Halsbury's Laws of England* (4th Ed) Vol 15, Education, p 46. See also **Disciplinary action; Discipline**.

Insurance Removal from a property-owner of the power of disposition of property by a government in times of war or hostilities. In marine insurance law, payments received by a shipowner as compensation after cessation of hostilities do not inure to the benefit of underwriters or the government: *A-G v Glen Line Ltd & Anor* [1929] 33 Ll L Rep 172.

Mental health The removal and keeping in custody of a person who appears to meet the criteria for involuntary admission to a mental hospital for observation. Detention may be ordered by a District Judge or magistrate under the Mental Health Ordinance (Cap 136) s 31; *Hospital Authority v District Judge* (HCAL 1372/2001, unreported). See also **Involuntary admission; Psychiatric examination; Voluntary admission**.

Tort The tort of false or unlawful imprisonment. It consists of the complete deprivation of liberty for any time, however short, in the absence of lawful authority. To be liable in false imprisonment, it must be demonstrated that the defendant had the necessary intention, as well as the ability, to detain the claimant. It must be shown that had the claimant attempted to leave premises controlled by the defendant, the defendant would have taken steps to stop him. It is not necessary that the claimant is aware of his imprisonment at the time: *Murray v Ministry of Defence* [1988] 2 All ER 521, 1 WLR 692 (HL); *Roberts v Chief Constable of Cheshire Constabulary* [1999] 2 All ER 326, 1 WLR 662 (CA). Detention also means 'detention in a detention centre': Detention Centres Ordinance (Cap 239) s 2. See also **False imprisonment**.

Detention centre Premises for the detention of young persons who are on remand or subject to control. A place or building appointed to be a detention centre under the Detention Centres Ordinance (Cap 239) s 3. In Hong Kong, it is for the Secretary for Security to appoint places or buildings as detention centres, in which young offenders may be detained. Such centres are run by the Commissioner of Correctional Services. A detention order can be made, if it is of the opinion that having regard to the circumstances of the case, his character and previous conduct it is in the interests of the young offender and the public, by the court against a person under the age of over 14 and under 25 years where he is apparently a young offender and is found guilty of a relevant offence: Detention Centre Ordinance (Cap 239) s 4. The primary object of such a sentence is reformatory and to deliver a short, sharp, shock to the offender: *A-G v Wong Loy Hing* [1977] HKLR 96; *R v Wong Kwok Kim* [1986] HKLR 910 (CA). See also **Child; Detention; Remand; Young Person**.

Detention of goods Unlawful retention of property adverse to the rights of the owner. It may render the

detailee liable for the tort of conversion. See also **Detinue; Wrongful interference with goods**.

Detention of vessel clause A clause used in a charterparty allowing for demurrage to be paid at a set rate when the ship is excessively detained for the purpose of loading or unloading.

Determinable 1. Capable of being determined or brought to an end. 2. In relation to an interest in property, an interest which continues until the occurrence of a specified event: for example, Estate Duty Ordinance (Cap 111) s 6. 3. A lease may provide that even if before the expiry of the term, it can be terminated by the lessor if the lessee breaches certain terms under the lease. A lease which is determinable 'if the parties think fit' may be determined only by the consent of both parties: *Fowell v Tranter* (1864) 3 H & C 458. As to joint tenants, where a lease is determinable under an express power contained in the lease for determination by 'the landlords', the lease may be determined by one of the landlords only if he has been authorised by all the landlords to exercise the power: *Re Viola's Indenture of Lease, Humphrey v Stenbury* [1909] 1 Ch 244; *Right d Fisher v Cuthell* (1804) 4 East 491. 4. In relation to gift, if such specified event is part of a void condition, the primary gift also voids. See also **Conditional gift; Contingency; Contingent gift**.

Determinable future time In relation to a bill of exchange, a fixed period after date or sight; or the time of occurrence, or a fixed period after occurrence, of a specified event which is certain to happen (although the time of happening may be uncertain): Bills of Exchange Ordinance (Cap 19) s 11. See also **Bill of exchange**.

Determinable interest An interest granted with a limitation as to its duration by reference to some event which may or may not occur.

Determinate sentence A sentence of imprisonment which has a definite term, that is a specified starting and finishing date, and is of a specified length. Also known as 'definite sentence'.

Determination agreement Where parties to a building contract agree to determine the contract upon such terms as they agree. The determination agreement may be oral or implied notwithstanding that the building contract itself is required to be in writing. See also **Building contract; Determination notice**.

Determination by effluxion of time 1. The interest in land expires or the right to enforce a claim is debarred due to lapse of time. Where land has been out of the possession of the documentary title holder and has been adversely possessed by a trespasser for a period prescribed by statute, the rights of the documentary title holder will for those reasons be extinguished.

or not the service is operated to a fixed timetable: Ferry Services Ordinance (Cap 104) s 2. The provision of ferry service is governed by the Ferry Services Ordinance under which a franchise is granted to a company to operate ferry services. See also **Passenger; Vessel**.

Fiat *Lat* – let it be done. 1. An authorisation, sanction, consent, short order or warrant of a public officer. 2. A consent of the Secretary for Justice or of the Chief Executive for the initiation of the prosecution of an offence. Some offences require the specific consent of either the Secretary for Justice or the Chief Executive. For example, the consent of the Secretary for Justice for the prosecution of the offence of incest is required: Crimes Ordinance (Cap 200) s 51; and the consent of the Chief Executive for the prosecution of an indictable offence, other than the offence of piracy, which is allegedly committed within the waters of Hong Kong by a non-Chinese citizen on board a non-Hong Kong ship is required: s 23C. See also **Attorney-General; Justiciability; Relator action; Standing**.

Fictional character In ordinary language, an imaginary person created within an artistic, literary, or dramatic work, with no direct counterpart in real life. Under copyright law, a fictional character may be protectable as a literary or artistic work provided it satisfies all the necessary requirements such as originality, work, artistry: Copyright Ordinance (Cap 528) ss 2, 4, 5; *Mirage Studios & Ors v Counter-Feat Clothing Co Ltd & Anor* [1991] FSR 145. However, it is unlikely that copyright protection can be extended to cover the invented name of a fictional character as such, if only the invented name is being used: *Wombles Ltd v Wombles Skips Ltd* [1975] FSR 488, [1977] RPC 99 (HC). Fictional characters may be protected by the action for passing off: for example, *Samuelson v Producers' Distributing Co Ltd* [1932] 1 Ch 201 (CA). See also **Artistic work; Copyright; Direct infringement; Dramatic work; Indirect infringement; Literary work**.

Fictitious bid A bid which is not genuine, and which is intended to drive up the bidding, made by a third person without the privity of the vendor or the auctioneer. It does not invalidate the sale, nor does it affect the vendor's right to specific performance: *Halsbury Laws of Hong Kong*, Vol 1, Auction [30.038]. See also **Auction; Auctioneer; Bid; Damping the sale; Knock down**.

Fictitious party In the context of negotiable instruments, a name inserted as that of the payee which is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, whether the name be that of an existing person or of one who has no existence: *Halsbury's Laws of England* (4th Ed, Reissue) Vol 4(1), para.332, *Bank of*

England v Vagliano Bros [1891] AC 107, [1891-1894] All ER Rep 93 (HL). Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer: Bills of Exchange Ordinance (Cap 19) s 7(3). The term 'fictitious' is also used in ss 5(2), 41(2), 46(2), 50(2) in reference to a drawee. See also **Bill of exchange; Drawer; Non-existing party; Payee**.

Fidelity The trust which exists between agent and principal that the agent will faithfully observe the duties and responsibilities owed to the principal, and that the principal will indemnify the agent against all liabilities incurred in the reasonable performance of the agency. The duty of fidelity arises by implication from the contract of employment: *Kishimoto Sangyo Co Ltd & Anor v Oba & Ors* [1996] 2 HKC 260 (CA). An employee is bound by his implied duty of fidelity and good faith to his employer: (i) not to use or disclose during his employment confidential information gained in the course of his employment; and (ii) not to use or disclose either during his employment or thereafter information which is not merely confidential but can properly be regarded as trade secrets. For breach of this duty damages are recoverable at common law. See also **Duty to keep accounts; Indemnity**.

Fidelity guarantee See **Fidelity guarantee insurance**.

Fidelity guarantee insurance An insurance policy which provides coverage against pecuniary loss as a result of criminal misappropriation of money or securities: *Re Norwich Provident Insurance Society, Bath's Case* (1878) 8 Ch D 334 (CA). Fidelity guarantee insurance usually relates to employment situations. Such policy may contain a condition requiring the defaulting employee be prosecuted at the expense of the insurer before a claim can be made. The policy may limit the time for a claim from the date of the fraudulent act or the date of discovering the loss: *T H Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd* [1953] 2 Lloyd's Rep 355.

Fiduciary A person who is under an obligation to act in another's interest to the exclusion of the fiduciary's own interest. A fiduciary has to account for profits acquired by him by reason of the opportunity and knowledge resulting from the fiduciary relationship unless fully informed and free consent is given: *Boardman & Anor v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46 (HL). See also **Fiduciary duty; Fiduciary relationship**.

Fiduciary duty An equitable duty to act in good faith for the benefit of another. A fiduciary duty arises in the context of a fiduciary relationship, such as that between trustee and beneficiary. There are certain well-recognised categories of relationship: for example, trustee and beneficiary; agent and principal; directors of

a company and the company; vendor and auctioneer; solicitor and client. Persons subject to a fiduciary duty are not permitted to profit from their positions (other than where expressly permitted) or to put themselves in a position where the fiduciary duty and personal interest may conflict: *Richard Ellis Ltd v Van HongTuon* [1988] 1 HKLR 169(CA); *Chiu Che Kuen v Or Yue Ling* (HCA 5543/90, unreported); *Chinese United Establishments Ltd v Cheung Siu Ki & Anor* [1997] 2 HKC 212 (HC); *Crosskill v Bower* (1863) 32 Beav 86. See also **Beneficiary; Directors' duties; Equity; Good Faith; Trustee**.

Fiduciary estate An estate vested in a fiduciary for the benefit of another. The fiduciary may be a legal title holder, as in the case of a trustee, or simply charged with the proper management of that property.

Fiduciary relationship A relationship of trust and confidence or of confidential relations: *Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46, 3 WLR 1009 (HL). The critical feature of a fiduciary relationship is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. A fiduciary relationship is a relationship which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his or her position. The extent of a fiduciary relationship may be restricted by a contract: *Kelly v Cooper & Anor* [1993] AC 205(PC). The relationship between solicitor and client is fiduciary giving rise to specific legal and professional obligations on the part of the solicitor: *McMaster v Byrne* [1952] 1 All ER 1362 (PC); *Brown v IRC* [1965] AC 244 (HL). See also **Beneficiary; Conflict of interest; Duty to disclose; Fiduciary; Trustee**.

Fieri facias *Lat* – cause to be done. A writ authorising a sheriff or an officer of the court to recover the amount of a judgment by distraint on goods and chattels of the judgment debtor: *Hong Kong Civil Procedure* (2002); *Halsbury's Laws of Hong Kong*, Vol 5, Civil Procedure [90.1316]. It is the most usual method of enforcement of a money judgment, the writ lies to enforce a judgment or order for the payment to any person of a sum of money or costs, but not into court: The Rules of the High Court (Cap 4A) O 45 r 1(1)(a). *Abbr* – fi fa.

FIFO See **First in first out valuation**.

Filing of documents The act of lodging documents with a court that have been accepted by the court. All originating process and pleadings, every affidavit in a cause or matter, acknowledgement of service and judgments must be filed into the court within the time as prescribed in the rules of the courts: The Rules of the

High Court (Cap 4A) O 12 r 1 (3), O 18 r 5A(1), O 41 r 9(4), O 42 r 5(4). Filing of documents involves the registrar of the court signing the documents and sealing them with a seal of the court and endorsing the serial number of proceedings on the documents filed. Litigants in person are permitted to file documents in person by sending them by post to the registry: O 63 r 3A(2). See also **Commence proceedings; Lodge**.

Fill or kill order A futures market order to buy or sell a particular security that is required to be executed immediately or cancelled. It often occurs where a person intends to buy a large quantity of shares of a particular stock at a particular price. If the order is likely to affect the market price for that stock significantly it will not be executed and can be withdrawn immediately. See also **Futures contract; Securities**.

Filling the gap Judicial remedying of an anomalous omission in a statutory provision by reading words into the gap in the provision. The technique is open to a court only where the omission, and how it should be remedied, are very clear. If a study of the statute as a whole leads inexorably to the conclusion that legislature has erred in its choice of words, the court can, and must, eliminate the error by interpretation. But mere 'manifest absurdity' is not enough; there must be an error which, in its context, defeats the intention of the statute: *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, 1 WLR 231 (HL). See also **Legalism**.

Film A cinematograph film, a still film, a videotape or laserdisc, including any sound-track associated with such film, videotape or laserdisc and any other record of visual moving images that is capable of being used for the subsequent screening of those images and includes any sound-track associated with such record and any combination or excerpt of the films stated above: Film Censorship Ordinance (Cap 392) s 2. All films in Hong Kong are subject to the Film Censorship Ordinance. A film intended for exhibition shall be submitted to the Authority to be dealt with either by an approval for exhibition with a classification or by an exemption: ss 8, 9, 10. See also **Cinematograph film; Cinematograph picture; Entertainment; Film classification**.

Film classification A uniform system of film classification operated by the Film Censorship Authority who shall be the Commissioner for Television and Entertainment Licensing: Film Censorship Ordinance (Cap 392) s 3. In Hong Kong, films are classified into three main categories in relation to the audience to which the film can be exhibited: Category I is for films approved for exhibition to persons of any age; Category IIA is for films approved for exhibition to persons of any age but not suitable for children; Category IIB is for films approved for exhibition to persons of any age but not suitable for young persons and children; Category III is for films approved for exhibition only to persons who

285). Mining is lawful only under a mining licence or mining lease: s 19. Mine operators must not divert or pollute waters and must purify waters used for mining purposes: ss 27, 28. The Director of Lands has the power to revoke a mining licence for contravention of the Ordinance or commission of offences against the Ordinance: s 31. Where mining operations are taking place, each shovelful or cut by the bulldozer is a separate act of development: *Thomas David (Porthcawl) Ltd v Penybont RDC* [1972] 3 All ER 1092, 1 WLR 1526 (CA). See also **Mineral**; **Poison**.

Minister of religion Generic term for bishops, clerics, parsons, priests, rectors, or vicars of all denominations or religious beliefs. Certain statutory rights are afforded to ministers of religion. A minister of religion who makes statements which may be slanderous or libellous is not, by virtue of holding clerical office, protected by any form of privilege: *Magrath v Finn* (1877) IR 11 CL 152. See also **Clerical privilege**.

Minor A person under the age of 18 years: Interpretation and General Clauses Ordinance (Cap 1) s 3. Therefore, a minor has not attained the age of majority of 18 years: Age of Majority (Related Provisions) Ordinance (Cap 410) s 2; a minor has no legal personality, and cannot sue or be sued for any criminal or civil actions. For example, a contract made with a minor is voidable at the option of the minor, provided the minor repudiates it during minority or within a reasonable time after reaching the age of majority: *Fung Kee v Tang Pun Sang* (1910) 6 HKLR 87; *Tang Kai Shang v Ng Pak To* (1895) 6 HKLR 90n (FC). See also **Age of majority**; **Child**; **Infant**.

Minor interest 1. An interest of minor importance or amount. 2. A relatively small share in ownership of property.

Statutes An interest considered by legislators to be of such marginal importance in a legislative scheme as to deserve a miscellaneous categorisation.

Minority A group of people whose characteristics (for example ethnicity, race, religion, language or gender) distinguish them from the majority of the population. It is often used to describe ethnic groups. See also **Rights of minorities**; **Racial group**.

Conflict of laws A group which is different from the majority of the population within a state. A minority may be characterised as linguistic, religious, ethnic or national; being numerically inferior to the rest of the population; having no controlling influence over that population; possessing distinctive ethnic, religious, or linguistic traits; and maintaining a sense of solidarity aimed at preserving its culture, traditions, religion, or language. The Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the International Human Rights Committee protect and

promote various minority rights recognised in the growing body of human rights law. See also **Discrimination**.

Minority interest The equity of those shareholders who do not possess controlling interests in a subsidiary company. For example if company A owns 65% of company B, the other shareholders in company B have a minority interest. It also refers to the shares held in subsidiary companies and reported in consolidated financial statements which are not owned by the holding company or by the consolidated group of companies. The protection of minority interests forms part of the responsibilities of a board of directors. The court will not readily interfere with a decision of the majority shareholders to alter the articles unless it is clearly shown that the majority shareholders were actuated by a desire to harm or injure the interests of the minority shareholders: *Sidebottom v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154 (CA). See also **Directors' duties**; **Financial statement**; **Minority shareholder**; **Subsidiary**.

Minority shareholder In corporations law, a shareholder whose voting rights do not provide control of the general meetings of the company. While a corporation is the proper plaintiff in respect of causes of action available to it as a separate legal entity, the courts of equity admit exceptions to this rule to ensure that controllers of a corporation cannot defraud the minority shareholders with impunity: *Spokes v Grosvenor and West End Railway Terminus Hotel Co Ltd* [1897] 2 QB 124. Despite the general rule that the only proper plaintiff in an action in respect of a wrong alleged to be done to a company is the company itself, a minority shareholder of a company may institute a derivative action: (*Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437); in his or her own name to redress a wrong done to the corporation if the acts complained of are of a fraudulent or criminal character, where the company has not sued in its own name because the alleged wrongdoers control it (Companies Ordinance (Cap 32) s 5B(2); *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; *Tan Eng Guan & Anor v Southland Co Ltd & Ors* [1996] 2 HKC 100 (CA)). However, if the company is in liquidation, a minority shareholder's action will not lie: *Cape Breton Co v Fenn* (1881) 17 Ch D 198 (CA). The position of the minority shareholders may be protected by the exercise of statutory rights (Companies Ordinance (Cap 32) s 131) or by using different classes of shares as a means of securing the position of the minority in the context of both general meetings and board meetings; or by purely contractual provisions: *Halsbury's Laws of Hong Kong*, Vol 20, Partnerships and Joint Ventures [290.229]. See also **Corporate crime**; **Derivative action**; **Minority interest**.

Mint A place where coins are made on behalf of the Government. The Financial Secretary may appoint a person, whether in Hong Kong or elsewhere, to mint the coins that have been authorised to be issued under the Coinage Ordinance (Cap 454) and the Financial Secretary may make the appointment on such terms as he thinks fit: Coinage Ordinance (Cap 454) s 5.

Minute book A record of all the minutes of the meetings of the board of directors of a company and of the general meetings, which shall be kept at the registered office of the company: Companies Ordinance (Cap 32) ss 119, 119A. Subject to such reasonable restrictions as the company may by its articles or in general meetings impose, the books containing the minutes of proceedings of any general meeting of a company shall during business hours be allowed for inspection by any member without charge: s 120. See also **Minutes**.

Minutes Written record required of all proceedings at general meetings and meetings of the board of directors: Companies Ordinance (Cap 32) s 119(1). Minutes should record resolutions and the results of any voting. The minutes are to be signed by the chairman of the meeting or the chairman of the following meeting: s 119(2). Minutes entered in the book are prima facie evidence of the proceedings at the meeting: s 119(3). The minute books are to be kept at the registered office of the company, or at the place where the work of making up the minute books is done, however, they shall not be kept at a place outside Hong Kong and must be available for inspection by members: ss 119A, 120. See also **Annual general meeting**; **General meeting**; **Registered office**.

Misadventure See **Accident**.

Misappropriation The wrongful application or stealing: *Gladstone City Council* [1980] Qd R 48; 44 LGRA 175. Where a *T'so* manager, acting as an agent of any clan, family or *t'ong*, misappropriates the money or property of the principal, the appointment of the *T'so* manager shall be cancelled by the Secretary for the Home Affairs: *Ng Shiu Hung v Sai Kung District Officer* (HCAL 2683/2000, unreported); New Territories Ordinance (Cap 97) s 15. See also **Duty to keep accounts**; **Fidelity**; **Misconduct**; **Passing off**.

Misappropriation rule The rule that company directors may not apply company property for their own personal benefit or for the benefit of any other person without the authority of the company. Subject to certain exceptions, a company must not, directly or indirectly, make a loan to a director of the company or of its holding company, or enter into any guarantee or provide any security in connection with a loan made by any person to such a director; or if any one or more of the directors of the company hold (jointly or severally or

directly or indirectly) a controlling interest in another company, make a loan to that other company or enter into any guarantee or provide any security in connection with a loan made by any person to that other company: Companies Ordinance (Cap 32) s 157H(2). See also **Directors' duties**; **Fiduciary**.

Miscarriage of justice 1. A departure from the rules which permeated judicial procedure as to make that which happened not in the proper sense judicial procedure: *Sky Heart Ltd v Lee Hysan Co Ltd* [1977] 1 HKC 18, 1 HKLRD 100 (CFA). What will constitute a miscarriage of justice may vary not only in relation to the particular facts but also with regard to the jurisdiction which has been invoked by the proceedings in question. The failure by the trial judge to deliver his judgment within or reasonable time might constitute a miscarriage of justice: *Bishopsgate Investment Management Ltd (In Liq) v Maxwell (No 2)* [1993] BCLC 814, BCC 120. 2. In criminal proceedings, there is miscarriage of justice where an accused person has lost a chance which was fairly open of being acquitted by reason of a failure to apply the rules of evidence, procedure, and the relevant law: *Yuen Kwai choi v HKSAR* (FACC 6/2002, unreported). It can occur as a result of misdirection or non-direction by the trial judge: *Tang Siu Man v HKSAR* [1998] 1 HKC 371 (CFA). In criminal appeal, the court may dismiss the appeal if it considers that no miscarriage of justice has actually occurred, notwithstanding that the point raised in the appeal might be decided in favour of the appellant: Criminal Procedure Ordinance (Cap 221) s 83(1). See also **Criminal justice system**; **Misdirection by trial judge**; **Proviso**; **Summing up**.

Mischief rule A rule of statutory construction, also referred to as the rule in *Heydon's Case* (1584) 3 Co Rep 7a, 76 ER 637, requiring the construction of an ambiguous word or phrase in a statute in the light of the 'mischief' or 'defect' in the existing law which the statute was intended to remedy. This rule is closely allied with the purpose rule: *HKSAR v S Space Design (HK) Co Ltd* [1997] 3 HKC 691. See also **Extrinsic materials**; **Golden rule**; **Literal rule**; **Purpose rule**.

Misconduct Wrongful, improper, or unlawful conduct, motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts. Misconduct may involve either gross negligence or a deliberate departure from accepted standards so as to portray indifference and an abuse of privileges. See also **Fidelity**; **Gross negligence**; **Misappropriation**.

Arbitration Such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice: *Williams v Wallis and Cox* [1914] 2 KB 478. It is misconduct for an arbitrator to fail to comply with the terms of an arbitration agreement, or to make an award which ought not to be enforced on the grounds of public

P

P & I policy A marine insurance policy whereby an insurer will indemnify the insured against the liability for cost or expenses of, or incidental to, the removal of the wreck of a vessel when such removal is compulsory by law: *MJ Rudolph Corp v Lumber Mutual Fire Insurance Co (The Cape Borer)* [1975] 2 Lloyd's Rep 108.

Package claim In an application for the grant of letters patent, a claim to a container with its contents together with a set of written directions: *Wellcome Foundation Ltd v Cmr of Patents* (1980) 145 CLR 520, [1980] HCA 21, 30 ALR 510. To succeed in a package claim, 'there must be an interaction between the container with its contents and the writing so that the instructions or directions are novel by virtue of their link with the process': *Wellcome Foundation Ltd v Cmr of Patents, supra*. Merely repacking an old product for a new purpose is insufficient. See also **Letters patent**; **Novelty**.

Parman defence A defensive strategy of a target company in response to a takeover bid in which the target company makes a counter-takeover bid for the entity which has made the takeover bid for it.

Paedophile A person who displays sexual desire directed towards children, usually of pre-pubertal or early pubertal age. Some paedophiles are attracted to only girls, others only to boys, and others are interested in both sexes. A person who commits an act of gross indecency with or towards a child under the age of 16, or who incites a child under the age of 16 to commit such an act with or towards him or her or another, is guilty of an offence: Crimes Ordinance (Cap 200) s 146(1). The disclosure of the identity of paedophiles to members of the public is a highly sensitive decision which should only be taken when there is a pressing need to do so; that, before reaching such a decision, the police need as much information as could reasonably be obtained, and the subject of the possible disclosure was often in the best position to provide information of value in assessing the risk posed: *R v Chief Constable of the North Wales Police & Ors, ex p Thorpe* [1999] QB 396, [1998] 3 WLR 57 (CA). See also **Child abuse**; **Sexual abuse**.

Paid-up share capital The amount that has actually been paid by shareholders in respect of the par or nominal value of shares issued to company members. Shares can be issued as 'fully paid' for consideration other than cash: *Ooregum Gold Mining Co of India Ltd*

v Roper, Wallroth v Roper [1892] AC 125 (HL); *Re Bradford Investments plc (No 2)* [1991] BCLC 688, [1991] BCC 379. The paid-up share capital of a company will equate to the issued share capital if all the shares are fully paid for. If all shares are fully paid-up, the paid-up capital will equal the nominal or issued capital. It will be lower if the shares are not fully paid-up, have been issued at a discount, have been issued in return for personal services or for assets other than money, or forfeited for some reason and resold at auction. Also known as 'subscribed capital'. See also **Capital**; **Issued share capital**; **Limited company**; **Share**; **Unpaid capital**.

Pain and suffering Physical and mental distress caused by injury and any treatment intended to alleviate it and its length (*Kralj v McGrath* [1986] 1 All ER 54); the awareness of and embarrassment at the disability or disfigurement (*Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910 (HL)), or by anxiety that the plaintiff's condition may seriously deteriorate (*Church v Ministry of Defence* (1984) 134 NLJ 623). Damages may be awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future, as a result of the injury: *Halsbury's Laws of Hong Kong*, Vol 22, Remedies [340.194]. Pain and suffering must be proved and, where the plaintiff has died as a result of his injuries, identified as an element separate from the death itself: *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65 (HL). An award under this head depends on the plaintiff's awareness of his suffering: pain and suffering, unlike loss of amenity, is a subjective loss: *Bou Kwok Leung Timothy v Yuen Ming Sun* (HCA 2706/87, unreported); *Kong Tak On v Johnny Lau* (HCA 6337/87, unreported). See also **Damages**; **Loss of amenities**; **Loss of expectation of life**; **Non-pecuniary loss**.

Painting A surface which has been covered in whole or in part with a film of coloured matter. In copyright law, 'painting' would be given its ordinary meaning: *Merchandising Corp of America Inc v Harpbond Ltd* [1983] FSR 32. It is listed under the category of 'graphic work' that is included in 'artistic work' for copyright protection purposes: Copyright Ordinance (Cap 528) s 5. See also **Artistic work**; **Copyright**; **Original work**.

Par In relation to the par value of a share, the amount or value ascribed to each share fixed at the time the shares are initially issued to subscribers. It is an

payable on demand or not: Bills of Exchange Ordinance (Cap 19) s 45(a), (b). Presentment for payment may be dispensed with in some circumstances: s 46. Presentment for payment is necessary in order to render the indorser of a note liable: s 93(2). 2. In relation to a cheque, where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right, at the time of such presentment, as between him and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid: Bills of Exchange Ordinance (Cap 19) s 74(a). See also **Counter presentation**; **Drawee bank**; **Presentment**; **Presentment for acceptance**.

President See **Chairman**.

Presiding member The member of a tribunal or commission whose functions include directing proceedings or hearings conducted by the body. A tribunal or commission is usually constituted with a presiding member. The jurisdiction of the Lands Tribunal shall be exercised by one or more of its members and in respect of any proceedings before a tribunal consisting of more than one member, it shall be presided over by the senior sitting member, unless the President or failing him, a presiding officer, expressly designates another member to preside at the hearing: Lands Tribunal Ordinance (Cap 17) s 9(1). It shall be sufficient if any document made or issued by the Lands Tribunal is signed by the presiding member or registrar: s 9(8). See also **Senior member**.

Presiding officer See **Chairman**.

Presumed undue influence A presumption of equity which operates when the parties at the time of the transaction or shortly before then were in a particular confidential relationship to each other, for example that of parent and child, or trustee and beneficiary, or solicitor and client, and the existence of undue influence over the one party (namely the child, beneficiary or client) will be presumed unless it is shown by the other party that it did not exist: *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021, [2002] 2 AC 773 (HL). The burden of proving this has commonly been discharged by showing that the transaction appeared fair and that the party who might have been subject to undue influence had competent independent advice: *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 3 All ER 351 (CA). See also **Relationship of influence**; **Undue influence**.

Presumption against bail At common law, the presumption against bail for murder and treason. The common law rule has now been replaced by a general statutory presumption in favour of bail: Criminal Procedure Ordinance (Cap 221) s 9D. However, a person charged with either murder or treason contrary to the Crimes Ordinance (Cap 200) s 2 may only be admitted to bail by a judge of the Court of First Instance: s 9G(10). See also **Bail**; **Burden of proof**.

Presumption against intestacy The presumption that a testator does not intend to die intestate: *Re Harrison* (1885) 30 Ch D 390. In interpreting a will, if there are two possible meanings of a word or phrase used by the testator, one which leads to an intestacy and one which does not, the court will favour the meaning which avoids an intestacy: *Pinney v Marriott* (1863) 32 Beav 643. The force of the presumption against intestacy varies according to the context and the circumstances: *Hall v Hall* [1892] 1 Ch 361 (CA). It applies especially to property which the testator has at the date of the will, but is not so strong as regards property which he has not yet acquired at that date: *Re Methuen and Blore's Contract* (1881) 16 Ch D 696. The presumption will not prevail over clear words in the will: *Enohin v Wylie* (1862) 10 HL Cas 1; *Re Wynn (dec'd)*, *Landolt v Wynn* [1983] 3 All ER 310, [1984] 1 WLR 237. Also known as 'Golden Rule'. A testator can be supposed to have intended to make a disposition to an existing rather than a non-existing person, this is an aspect of the law's presumption against intestacy: *Hong Kong Bank Trustee Ltd & Anor v Fu Chui Ying & Ors* [1994] 1 HKC 702. See also **Interpretation**; **Intestacy rules**.

Presumption of advancement The presumption that, where a married person transfers property to his or her spouse who is not the purchaser of the property, the transfer was intended to be a gift: *Tinker v Tinker* [1970] P 136, 1 All ER 540 (CA). The person providing money was under an obligation to support or make provision for the recipient: *Overseas Trust Bank Ltd v Lee See Ching & Anor* [1999] 3 HKC 197. The presumption of advancement to a wife no longer carries the weight that it once did: *Re Mak Woon Shui, (dec'd)* [1992] 2 HKC 144 (CA). The presumption may also arise where the parent of a child makes voluntary disposition of real or personal property: *Tsang Chuen v Li Po Kwai* [1932] AC 715. However, no presumption of advancement exists when a mother made a purchase of property in her child's name: *Watson v Smith* [1998] 3 HKC 461, 2 HKLRD L34 (CA). The presumption of advancement can be rebutted by evidence of a contrary intention: *Cheung Lily v Cmr of Estate Duty* [1987] 3 HKC 307, 1 HKLR 517. It does not apply to a co-habitee or a de facto husband and wife: *Wong Mei Lin v The Personal Representative of the Estate of Lam Leung*

Ping (dec'd) (HCA 12880/99, unreported). See also **Advancement**; **Resulting trust**.

Presumption of death 1. A legal inference that a person may be presumed dead within a given period where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more, and it can be proved (1) that there are persons who would be likely to have heard of him over that period; (2) that those persons have not heard of him; and (3) that all due inquiries have been made appropriate to the circumstances, without result: *Chan Wing Sze v Chau Kin Hung* [1983] 1 HKC 518. An applicant for a grant of representation can seek leave from the court to swear the death of a person in whose estate a grant is sought, where there is no direct evidence of his being dead, but only evidence from which his death may be presumed to have taken place: Non-Contentious Probate Rules (Cap 10A) r 52. The presumption does not determine that such person died at any particular time nor that he or she continued living up to the end of the seven years: *Re Callicott's Goods* [1899] P 189. The presumption may be raised in succession law to show that a testator, intestate, or beneficiary is dead. 2. In family law, if a party to a marriage has been absent from the petitioner in such circumstances and for such length of time as to provide reasonable grounds for presuming him or her to be dead, then this provides grounds for applying for a dissolution of the marriage: Matrimonial Causes Ordinance (Cap 179) s 26(1). Presumption of death was made out if the respondent had been continually absent from the petitioner for seven years prior to the application, and it was established that the petitioner had no reason to believe that the respondent was alive during that period: s 26(2). Each case must be determined on its own facts: *MacDarmid v A-G* [1950] P 218, 1 All ER 497. The District Court or the Court of First Instance only has power to a presumption of death and dissolution of marriage in respect of customary marriages celebrated in accordance with the Marriage Reform Ordinance and registered in accordance with that Ordinance; and monogamous marriages: Marriage Reform Ordinance (Cap 178) ss 9-13; Matrimonial Causes Ordinance (Cap 179) s 9. See also **Administration**; **Benjamin Order**; **Death**; **Judicial separation**; **Petitioner**; **Probate**.

Presumption of innocence A rule of criminal law that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law: Hong Kong Bill of Rights Ordinance (Cap 383) s 8 art 11(1); International Covenant on Civil and Political Rights (ICCPR) art 14(2); Basic Law art 87 para 2. The presumption of innocence is fundamental to the protection of human rights. The burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt: *A-*

G v Lee Kwong Kut (1993) 3 HKPLR 72, [1993] AC 951, 3 All ER 939 (PC). The presumption of innocence implies a right to be treated in accordance with this principle, that is, a duty for all public authorities to refrain from prejudging the outcome of a trial: Human Rights Committee (HRC) General Comment No 13 (21st session, 1984). See also **Beyond reasonable doubt**; **Burden of proof**; **Innocent**.

Presumption of insurer's knowledge In marine insurance, the assured is entitled to assume that the insurer is acquainted with matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such ought to know, and therefore need not communicate to the insurer facts as to that usage Marine Insurance Ordinance (Cap 329) s 18(3)(b). For instance, the general nature and circumstance of the branch of trade to which the policy relates: *North British Fishing Boat Insurance Co Ltd v Starr* (1922) 13 Ll L Rep 206. Even if the trade is newly established, usages are presumed to be known to the insurer: *Noble v Kennoway* (1780) 2 Doug KB 510; 99 ER 326. An insurer is presumed to know if war is imminent, or that a state of war exists in some remote part of the world: *Schloss Bros v Stevens* [1906] 2 KB 665. See also **Insurance**; **Insurance contract**.

Presumption of legitimacy The presumption that a child is legitimate if he is born in wedlock. The presumption of law as to a child's legitimacy arising by virtue of the marriage of the child's mother at a time related to the conception or birth of the child may be rebutted by proof on a balance of probabilities: Parent and Child Ordinance (Cap 429) s 5(3). This presumption applies in the case of a void or voidable marriage as it does in the case of a valid marriage: s 5(4). A child born as a result of a woman receiving artificial insemination will be protected by the presumption of legitimacy. Unless the husband can show that he did not consent to the wife receiving artificial insemination, he will be regarded as the father of the child: s 10(2). Where there was no scientific evidence or evidence from the parents, the question of whether a person was the lawful and natural child of his parents must be approached from a common sense point of view, having regard to the evidence available and all the relevant circumstances in the light of the presumption of legitimacy; the starting point must be the conduct of the parents: *Kwan Chui Kwok Ying & Anor v Tao Wai Chun & Ors* [1995] 1 HKC 374 (HC). See also **Bastard**.

Presumption of lost grant A legal fiction under which the English courts presume a grant of title to an easement where the alleged owner of the dominant tenement, in more recent times after 1189, can prove enjoyment of the right of way for 20 years: *Dalton v Angus & Co* (1881) 6 App Cas 740 (HL). This

implied by conduct (*Forman & Co Pty Ltd v The Ship Liddesdale* [1900] AC 190 (PC)); or occur by positive acts of adoption (*Ho Tung v Man On Insurance Co* [1902] AC 232 (PC)) or by acquiescence (*Gimex Development Ltd v Cua Wai Tai* [2000] 1 HKC 241, 1 HKLRD 14 (CA)). To constitute a valid ratification the following must be satisfied: (1) the agent whose act is sought to be ratified must have purported to act for the principal (*Keighley, Maxsted & Co v Durant* [1901] AC 240 (HL)); (2) at the time the act was done the agent must have had a competent principal (*Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 3 All ER 204, 1 WLR 1051); and (3) at the time of the ratification the principal must be legally capable of doing the act himself (*Firth v Staines* [1897] 2 QB 70). See also **Agency; Agent; Principal; Ratification by acquiescence; Undisclosed principal.**

Contract Adoption by a principal of a contract that was entered into by his or her agent without authority or in excess of the agent's authority. The principal is thus bound by that contract as if he or she had personally entered into it: *Wilson v Tumman* (1843) 6 Man & G 236, 134 ER 879. Acting in accordance with the terms of contract made by the agent also constitutes ratification: *Ho Tung v Man On Insurance Co* [1902] AC 232 (PC). Ratification of a contract required to be in writing need not be effected by writing: *Sheridan v Higgins* [1971] IR 291 (SC). Although an undisclosed principal cannot ratify excesses of authority by his agent (*Spiro v Lintern* [1973] 3 All ER 319, 1 WLR 1002 (CA)), because only the person in whose name or on whose behalf the acts were purportedly to be done may ratify (*Keighley, Maxsted & Co v Durant* [1901] AC 240 (HL)), undisclosed and unascertainable principals may ratify an insurance policy taken out for their benefit as long as the agent intended to benefit those having the same type of insurable interest as those claiming to ratify: *Yangtze Insurance Association v Lukmanjee* [1918] AC 585 (PC). A contract of marine insurance is capable of being ratified even if the assured subsequently became aware of the loss: Marine Insurance Ordinance (Cap 329) s 86. See also **Actual authority; Agent; Principal.**

Foreign relations The process by which a signatory state to a treaty confirms that it intends to be bound by that treaty. Ratification is usually performed by the sovereign, head of state, foreign minister, or parliament in accordance with the constitutional law of the state. In the People's Republic of China, ratification is performed by the Standing Committee of the National People's Congress in accordance with the Law of the People's Republic of China on the Procedure for Concluding Treaties (28 December 1990). Where a treaty indicates ratification as the appropriate mode of consent, the consent of a party to be bound by the treaty is ineffective until ratification: Vienna Convention on the Law of Treaties 1969 arts 11, 14. Multilateral treaties

take effect following a given number of ratifications, generally one-third of the signatories to the agreement. See also **Signatory; Treaty.**

Ratification by acquiescence In agency law, ratifying conduct of a principal who fails to object within a reasonable time after acquiring notice of the agent's unauthorised act: *Gimex Development Ltd v Cua Wai Tai* [2000] 1 HKC 241, 1 HKLRD 14 (CA). Even if silence does not amount to ratification, prolonged silence resulting in detriment to a third party may raise an estoppel: *Fung Kai Sun v Chan Fui Hing* [1951] AC 489 (PC). Ratification must be clear and must bear a distinct reference to the facts of the particular case, but it need not necessarily be proved by positive acts of adoption: *Gimex Development Ltd v Cua Wai Tai, supra.*

Ratio Lat. In Roman law, the reason or motive for a juridical act. See also **Ratio decidendi.**

Ratio decidendi *Lat* - Reason for deciding. The general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi: *Cheung Lai Wah (an Infant) & Ors v Director of Immigration (No 2)* [1998] 2 HKC 382 (CA). If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum: *Jacobs v London County Council* [1950] AC 361. Ratio decidendi of higher courts is binding on lower courts by virtue of the common law doctrine of precedent. However, where the decision of the higher court is overturned because it has misinterpreted the authorities or the law, and possibly faulty reasoning, the lower court is free to depart from it: *CIR v Indosuez Wi Carr Securities Ltd* [2002] 1 HKC 359. To be contrasted with 'obiter dicta'. See also **Obiter dictum; Stare decisis.**

Rationale *Lat* - a reasoned explanation of principles; the fundamental basis (of anything).

Re *Lat* - in the matter (of); in relation to; in reference to; concerning. Re is frequently used to designate proceedings in which there is only one party.

Reading See **Pupillage.**

Reading down The construction of a legislative provision of general application so as to confine it to an application within legislative power. Where a provision of general application applies without limitation to a subject matter, some of which is beyond power, it will be possible to read down the application of that provision to that subject matter within legislative power if the legislation itself indicates a standard or test for such a reading down and the operation of the legislation upon

the subject matter within power is not altered: *Pidoto v Victoria* (1943) 68 CLR 87. For example, legislation found to be inconsistent with the Bill of Rights may not be 'read down' so that it may be regarded as being consistent with the Bill of Rights: *A-G v Lee Kwong Kut* [1993] 2 HKCLR 186, AC 951, 3 HKPLR 72, (PC). See also **Severance.**

Re-admission Admission to practise as a legal practitioner after having been struck off the roll of legal practitioners. Where a barrister was struck off the roll voluntarily, the court has the inherent jurisdiction to restore that barrister on the roll on his application: *In the matter of a Barrister and In the matter of the inherent jurisdiction of the Court* (HCMP 3758/93, unreported). It is necessary for the applicant for re-admission to satisfy the court that the person is a fit and proper person to be restored to the Roll and that the events leading to the application to be struck off the roll did not make the applicant permanently unfit to practise as a solicitor: *Re Duffy* (HCMP 2579/87, unreported). See also **Admission; Fit and proper person; Misconduct; Striking off the roll.**

Read-only memory *Abbr* - ROM A computer's primary storage area used to serve the central processing unit by holding permanent data or instructions. The memory chips carrying the ROM are non-volatile, meaning they can retain the data even after the computer has been switched off. Data in ROM can be retrieved and used, but not changed. See also **Central processing unit; Random-access memory.**

Ready and willing Possessing both the intention and capacity to perform one's contractual obligations. The words 'ready and willing' imply not only the disposition, but the capacity to do the act: *Measures Bros Ltd v Measures* [1910] 2 Ch 248 (CA). In relation to sale of goods, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, ie the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods: Sale of Goods Ordinance (Cap 26) s 30. The purchaser's obligation was to show it was ready and willing to pay the price in exchange for the possession of goods: *Zego Ltd v Valdivia* [1991] 1 HKC 11 (CA). A breach of the duty of the purchaser to be ready, willing and able to complete a conveyancing transaction on the date and at the time fixed for completion will usually entitle the vendor to treat the contract as having been repudiated by the purchaser: *World Ford Development v Ip Ming Wai* [1993] 1 HKC 98. However, the due completion of a conveyancing transaction requires co-operation between vendor and purchaser, so the vendor, like the purchaser, must also be ready, willing and able to complete his part of the contract, in accordance with the terms and at the time and place fixed for completion: *China Pride*

Investment Ltd v Silverpole Ltd [1994] 2 HKC 341 (CA). In a contract of employment the employee's consideration is being ready and willing to serve, not necessarily actually working: *Henthorn and Taylor v Central Electricity Generating Board* [1980] IRLR 361 (CA). Also known as 'ready, willing and able'. See also **Anticipatory breach; Breach; Completion; Performance; Repudiation; Settlement; Specific performance.**

Arbitration In relation to an applicant for a discretionary stay, possessing the intention and capacity not to use arbitration to postpone resolution of the dispute, or to block the progress by refusing to appoint an arbitrator: *Manchester Ship Canal Co Ltd v Pearson & Son Ltd* [1900] 2 QB 606 (CA). Great delay by the applicant may imply that he or she is not ready and willing, but mere delay is insufficient: *Cheung Wing Kong (t/a Profit Extend Co) v Ma Chan Shing (t/a Wing Yick Knitting Factory)* (HCA 7592/91, unreported). The applicant must satisfy the court not only that he is, but also that he was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration: Arbitration Ordinance (Cap 341) s 6(1). The affidavit in support of the application for a stay must state that this is the case: *Euro-America Insurance Ltd v Lite Best Co Ltd* [1993] 1 HKC 333, 1 HKLR 217. See also **Dispute resolution; Stay of arbitration.**

Ready, willing and able See **Ready and willing.**

Real action A form of action, first available in the medieval common law courts, which allowed recovery of the thing ('res') the subject of the dispute because monetary compensation was regarded as insufficient. The action was limited to recovering estates in land, and not leaseholds. It was abolished in England on 31 December 1834. As there is no freehold property in Hong Kong, there is virtually no 'real property' to speak of and hence the term 'real action' is of little significance in Hong Kong. See also **Personal action; Real property.**

Real and personal effects A phrase, used mainly in wills, that means all the real and personal property of the testator. The phrase includes all property of the testator that has monetary value, however, it does not include money. A gift of the testator's 'effects' without a context sufficient to control it, may include the whole of the testator's personal estate where that property is not otherwise disposed of by the will, and is prima facie confined to personal estate unless an inference to the contrary arises from the context, in which case even real estate may be comprised in the term: *Hogan v Jackson* (1775) 1 Cowp 299. See also **Personal effects; Personal property; Real property; Testator; Will.**

to be the subject of settlement. Although it is uncommon in Hong Kong, it is possible to have settled land under which the tenant for life or statutory owner is bound to give effect to the equitable interests and powers in or over the land. But there is no specific legislation dealing with settled estates. Enforcement of the settlement would be in equity, similarly to a trust: *Halsbury's Laws of Hong Kong*, Vol 16, Land [230.0083]. The fact that part of an estate is settled land does not make the whole estate settled land. Land held on charitable, ecclesiastical or public trusts is no longer settled land, whenever the trust was created: *Halsbury's Laws of England* (4th Ed, Reissue) Vol 42, para 680. See also **Settlement**.

Settlement A disposition of property; the compromise or resolution of a claim or dispute.

Practice and procedure The compromise of a claim. When a matter has settled, the parties have reached some kind of agreement and no longer require the court to deliberate between them. There are various forms and methods which the parties can utilise to settle a threatened action or pending proceedings, including: (1) a settlement by way of contract before or after action is commenced; (2) a consent judgment, being an agreement to enter judgment by consent; (3) an agreement for the defendant to submit to judgment; (4) a 'Tomlin' order, being an order by consent to stay proceedings; and (5) an order by consent for the action to be dismissed, discontinued or withdrawn. It is for the parties to choose the most appropriate form and method to settle the matter, taking into account the terms which they have agreed to ensure that the settlement should not itself cause fresh disputes or litigation: *McCallum v Country Residences Ltd* [1965] 2 All ER 264, 1 WLR 657. However, there is nothing contractual about payment into court, which is a wholly procedural matter and is not truly analogous to an out-of-court settlement arranged between the parties: *Cumper v Potheary* [1941] 2 KB 58. In certain categories of cases or circumstances involving a public interest element, the parties may not settle the proceedings or any questions in disagreement without the court's approval or sanction. These cases or circumstances include matters concerning or relating to: (1) persons under disability (The Rules of the High Court (Cap 4A) O 80 r 10); (2) actions concerning the estate of a deceased person or trust property or the construction of a written instrument (O 15 r 13); (3) actions by representative parties; (4) actions for defamation, malicious prosecution or false imprisonment in which it is desired to make a statement in open court in terms approved by the judge (O 82 r 5); and (5) insolvency proceedings. Where a settlement or compromise is entered into with one of two joint tortfeasors (or persons jointly liable for breach of contract), the other joint tortfeasor (or person jointly liable for breach of contract) may still be sued for any outstanding liability unless the settlement or compromise

provides otherwise: Civil Liability (Contribution) Ordinance (Cap 377) s 7; *Chien Ngan Sang v Lai Kam Hing & Anor* [2002] 2 HKC 448. See also **Case management**; **Compromise**; **Consent judgment**; **Consent order**; **Payment into court**; **Tomlin order**.

Real property 1. Any non-testamentary disposition in writing, whether made voluntarily or upon a good or valuable consideration other than a bona fide pecuniary consideration, whereby any definite and certain property is settled or agreed to be settled in any manner for any purpose whatsoever: Estate Duty Ordinance (Cap 111) s 3(1). A method by landowners to protect their family landholding and to provide for their extended family by rendering the land effectively unalienable, by settling land on trustees to hold the land on trusts which provided for a number of successive interests to family members. Trustees and all beneficiaries would need to agree to and participate in the sale of land so as to pass full legal and equitable ownership to purchaser: Nield, *Hong Kong Land Law* (2nd Ed) Ch 9 pp 209-210. 2. In a land sale, the point at which all contractual obligations are completed by all parties, the purchase price is paid, and a conveyance of the property is taken by the purchaser. See also **Conveyance**; **Trustee**.

Succession 1. Any non-testamentary disposition in writing, whether made voluntarily or upon a good or valuable consideration other than a bona fide pecuniary consideration, whereby any definite and certain property is settled or agreed to be settled in any manner for any purpose whatsoever: Estate Duty Ordinance (Cap 111) s 3. 2. A deed creating successive interests in property at the time of disposition or present rights in future possession. See also **Beneficiary**; **Disposition**.

Trusts A procedure by which a person (the 'settlor') can create a trust. The settlor disposes of his or her interest in the property by vesting the property in a trustee, following necessary steps to pass the legal interest to the trustee, and the trustee agrees to hold the property subject to trusts for nominated beneficiaries. The settlor must intend to create a trust if it is to be enforceable in a court of equity: *Vandervell v IRC* [1967] 2 AC 291. See also **Beneficiary**; **Settlor**; **Trust**; **Trustee**.

Settlement day 1. The day on which an executed security trade must be settled; the day on which a buyer must pay for the securities delivered by the seller. In relation to the shares traded through the Stock Exchange of Hong Kong, the settlement day is usually two working days after the trade was executed. 2. In the derivatives market, the settlement day is the date upon which the parties must fulfil their obligations specified in the futures or options contract. Derivatives contracts can be settled physically, that means the seller will deliver the underlying asset in exchange for cash, therefore they are usually cash settled.

Settlement of property An instrument, such as deed, will, agreement for a settlement, or other instrument, or any number of instruments, under or by virtue of which instrument or instruments any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession: Estate Duty Ordinance (Cap 111) s 30(2). It settles, transfers, disposes of, or devises real property to another person upon trust or for any number of beneficiaries in a will: *Re Doyle (Dec'd)*, *ex p Brien v Doyle* (1993) 41 FCR 40. See also **Deed**; **Realty**.

Settler One who settles or draws up documents and decides on their terms. Barristers settle or compromise legal cases on terms that are in the interests of their clients.

Settlor A person who creates a trust by manifesting a sufficiently certain intention that a trust was intended in favour of one or more beneficiaries or purposes recognised as valid objects of a trust. See also **Beneficiary**; **Donee**; **Donor**; **Trust**.

Severability A principle of interpretation which relates to the independence of part of a statute or contract allowing it to be removed from the main instrument, without undermining the integrity of the instrument as a whole. For example, in relation to severability of statute, unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part, leaving the rest intact: *A-G v Cheung King Chow* [1990] 1 HKLR 659. It may be appropriate to sever what is invalid if the character of what remains is unaffected: *R v St Edmundsbury Borough Council, ex p Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234. See also **Severance**.

Severable contract 1. A contract which is not entire, and from which it is possible to sever terms. Part of the contract may be frustrated and part remain in force: *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, 1 All ER 678 (HL). 2. A contract in which the parties have divided the contract price into a number of instalments each corresponding to a definite proportion of the other party's performance: for example, Sale of Goods Ordinance (Cap 26) s 33(2). See also **Entire contract**; **Performance**; **Severance**.

Several 1. Being more than two. 2. Separate, distinct, independent, as distinguished from joint. 3. Individual, exclusive, as distinguished from common.

Several concurrent liability The liability attracted by several concurrent tortfeasors. If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage: *Devonshire*

(*Owners*) v *Leslie (Owners)* [1912] AC 634 (HL). Any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage: Civil Liability (Contribution) Ordinance (Cap 377) s 3(1). See also **Concurrent liability**; **Contribution**; **Several concurrent tortfeasors**.

Several concurrent tortfeasors Two or more wrongdoers whose independent and separate torts, when combined, inflict one and the same damage on another person. Several tortfeasors are said to be several liable: *Devonshire (Owners) v Leslie (Owners)* [1912] AC 634 (HL). A plaintiff may sue each tortfeasor separately for their contribution in causing the damage, and the result of one action does not affect the result of the others: *Jameson v Central Electricity Generating Board* [1998] QB 323 (CA). Alternatively, several tortfeasors may be sued together as co-defendants in a single action even though the cause of action against each is different. Several concurrent tortfeasors are opposed to joint concurrent tortfeasors whose single tortious conduct caused the injury. A tortfeasor can claim contribution from another tortfeasor who is liable for the same damage as a several tortfeasor: Civil Liability (Contribution) Ordinance (Cap 377) s 3(1). See also **Co-defendant**; **Concurrent tortfeasors**; **Contribution**; **Joint concurrent tortfeasors**; **Several concurrent liability**; **Several liability**.

Several liability Legal responsibility which is divisible or separable; liability capable of being severed, separated, or divided between two or more tortfeasors so that each tortfeasor is only partially responsible for the damage caused. Joint and several tortfeasors may be jointly and severally liable in tort in respect of the same injury to another person or property. Liability is several when a person injured by two or more tortfeasors has the option of suing each of the tortfeasors separately in distinct for their contribution to the damage. Where the tortfeasors are jointly liable, the injured party sues them as a group or joins several tortfeasors as co-defendants in the one action. See also **Concurrent liability**; **Concurrent tortfeasors**; **Several concurrent tortfeasors**.

Several ownership In relation to property, separate ownership, as opposed to joint or concurrent ownership.

Several promise 1. A promise made by two or more co-promisors which is cumulative, so that if it takes the form 'A separately promises C, and B separately promises C, to pay C \$1000', then A and B each promise to pay \$1000, that is, \$2000 in all. 2. A promise made to two or more co-promisees which is cumulative, being of the form 'A promises B to pay B \$1000 and A promises C to pay C \$1000', there being