

# Contents

<i>Preface to the Fourth Edition</i> .....	v
<i>Table of Cases</i> .....	xvii
<i>Table of Legislation</i> .....	lv

## CHAPTER 1 Function and Sources of Contract Law in Hong Kong .....1

1.1	Definitions of Contract .....	1
1.2	Contract Law and the Free Society .....	2
1.3	Origins of Hong Kong Contract Law .....	7
	(a) <i>Medieval contracts</i> .....	7
	(b) <i>Action of Debt sur contract</i> .....	9
	(c) <i>Action of Debt sur obligation</i> .....	14
	(d) <i>Action of Covenant</i> .....	15
	(e) <i>Early-modern contracts</i> .....	20
	(f) <i>Special trespass (trespass on the case)</i> .....	20
	(g) <i>Special trespass (assumpsit)</i> .....	22
	(h) <i>Special trespass and misfeasance</i> .....	23
	(i) <i>Special trespass and deceit</i> .....	25
	(j) <i>Special trespass and nonfeasance</i> .....	26
	(k) <i>Wholly executory agreements</i> .....	33
	(l) <i>Birth of modern contract law</i> .....	35
	(m) <i>Seventeenth and eighteenth centuries</i> .....	39
	(n) <i>Nineteenth and twentieth centuries</i> .....	41
1.4	Sources of Hong Kong Contract Law .....	46
	(a) <i>The Basic Law</i> .....	46
	(b) <i>Application of English law</i> .....	47
	(c) <i>The common law</i> .....	48

## CHAPTER 2 Formalities .....55

2.1	Nature of Formalities .....	55
2.2	General Rule as to Formalities .....	58
2.3	Contracts Required to be Made by Deed .....	59
2.4	Form of Deeds .....	60
2.5	Contracts Required to be in Writing .....	61
2.6	Contracts Requiring Written Evidence .....	62
	(a) <i>Origins of writing requirement affecting land contracts</i> .....	63
	(b) <i>Transactions affected</i> .....	63
	(c) <i>Content of the memorandum or note</i> .....	64
	(d) <i>Memorandum or note must evidence contractual intention</i> .....	68
	(e) <i>Joinder of documents</i> .....	70
	(f) <i>Errors in memorandum or note</i> .....	71

4.4	Meaningless Terms .....	184
4.5	Non-essential Terms .....	186
<b>CHAPTER 5 Consideration.....</b>		<b>191</b>
5.1	Introduction to Consideration .....	191
5.2	Definition of Consideration.....	194
5.3	Sufficiency of Consideration.....	195
	(a) <i>Adequate value not required</i> .....	195
	(b) <i>Avoidance of trouble or inconvenience</i> .....	198
	(c) <i>Forbearance from pursuing legal claim</i> .....	200
	(d) <i>Detriment to promisee</i> .....	203
	(e) <i>Performance of contractual duty owed to third party</i> .....	207
	(f) <i>Promise or performance of contractual obligation</i> <i>already owed to promisee — practical benefit</i> .....	214
	General rule .....	214
	Practical benefit as (substitute for) consideration.....	216
	Duress .....	221
	Contract variation and continuing need for consideration.....	224
	Practical benefit and promissory estoppel .....	227
	(g) <i>Performance of public duty imposed by law</i> .....	229
	(h) <i>Part payment of debt</i> .....	233
	Rule in Pinnel's Case.....	234
	Exceptions to rule in Pinnel's Case .....	242
5.4	Past Consideration .....	252
	General rule .....	252
	Timing of term's introduction .....	253
	Implied assumption .....	259
	Legislation .....	265
5.5	Consideration Must Move from Promisee at Promisor's Request ..	266
<b>CHAPTER 6 Estoppel.....</b>		<b>275</b>
6.1	Introduction to Estoppel.....	275
6.2	Promissory Estoppel .....	276
	(a) <i>The emergence of promissory estoppel</i> .....	276
	(b) <i>Clear and unequivocal promise</i> .....	282
	(c) <i>Alteration of position</i> .....	294
	(d) <i>Inequitable conduct by promisee</i> .....	304
	(e) <i>Suspension and extinction of rights</i> .....	306
	(f) <i>Defensive character of promissory estoppel</i> .....	309
6.3	Proprietary Estoppel.....	313
6.4	Equitable Estoppel .....	316
6.5	Estoppel by Convention.....	336
<b>CHAPTER 7 Intention to Create Legal Relations.....</b>		<b>351</b>
7.1	Introduction to Intention .....	351
7.2	Domestic Agreements.....	352

	(g) Customary Chinese conveyances .....	74
	(h) Short leases .....	75
2.7	Electronic Communications .....	75
2.8	Failure to Comply with Requirements as to Writing .....	76
2.9	Part Performance .....	78
	(a) Conduct constituting part performance .....	78
	(b) Conduct by party denying existence of enforceable contract .....	81
	(c) Part performance and damages .....	82
<b>CHAPTER 3 Offer and Acceptance.....</b>		<b>83</b>
3.1	Consensus Ad Idem .....	83
3.2	Offer .....	83
	(a) Unilateral and bilateral offers and contracts .....	83
	(b) Replies to enquiries .....	84
	(c) Advertisements .....	86
	(d) Shop displays .....	92
	(e) Prices displayed on websites .....	96
	(f) Tenders .....	97
	(g) Auctions .....	104
	(h) Revocation of offer .....	108
	(i) Lapse of offer .....	112
3.3	Acceptance .....	114
	(a) Rejected offer cannot later be accepted .....	115
	(b) Acceptance and counter-offer .....	116
	(c) Communication of acceptance: general rule .....	122
	(d) Communication of acceptance: email and other electronic communications .....	126
	(e) Communication of acceptance: postal acceptance rule .....	129
	(f) Communication of acceptance: waiver by offeror .....	133
	(g) Prescribed means of acceptance .....	135
	(h) Acceptance by conduct .....	138
	(i) Acceptance in ignorance of offer .....	146
3.4	Continuing Requirement of Offer and Acceptance .....	149
<b>CHAPTER 4 Certainty of Terms.....</b>		<b>153</b>
4.1	Requirement of Certainty .....	153
4.2	Uncertainty as to Consideration .....	153
4.3	Uncertainty and Commercial Agreements .....	157
	(a) Contextual construction .....	158
	(b) Agreed mechanisms .....	161
	(c) General law .....	167
	(d) Partial performance and parties' conduct .....	169
	(e) Executory agreements .....	176
	(f) Limits on implying essential terms from parties' conduct .....	178
	(g) Ambiguous conduct .....	180

7.3	Social Agreements .....	360
7.4	Commercial Agreements .....	365
7.5	Letters of Comfort.....	372
7.6	Collective Labour Agreements .....	376
<b>CHAPTER 8 Express Terms .....</b>		<b>383</b>
8.1	Introduction to Terms .....	383
8.2	Written Terms — Signed.....	384
	(a) <i>Effect of signature</i> .....	384
	(b) <i>Incorporation by reference</i> .....	387
	(c) <i>Non-contractual documents</i> .....	389
	(d) <i>Unusual and onerous provisions</i> .....	389
8.3	Written Terms — Unsigned .....	394
	(a) <i>Timeliness</i> .....	394
	(b) <i>Contractual document</i> .....	396
	(c) <i>Reasonable notice</i> .....	397
	General principles.....	397
	Non-comprehended language.....	402
	Onerous and unusual terms.....	406
	Regular and consistent dealings .....	408
8.4	Pre-contractual Statements .....	410
	(a) <i>Invitation to verify</i> .....	411
	(b) <i>Invitation not to verify</i> .....	411
	(c) <i>Timing of the statement</i> .....	412
	(d) <i>Declared importance of statement</i> .....	412
	(e) <i>Relative expertise of the parties</i> .....	412
	(f) <i>Agreements reduced to writing</i> .....	416
	(g) <i>Collateral contract</i> .....	416
	General principle .....	416
	Continuing relevance.....	419
	(h) <i>'Entire contract' clauses</i> .....	425
8.5	Interpretation of Terms .....	427
	(a) <i>General principles of interpretation</i> .....	427
	Four corners rule.....	427
	Textual ambiguity and matrix of fact.....	428
	Ambiguity resulting from matrix of fact .....	432
	Unambiguous but surprising text.....	433
	Contextual primacy.....	436
	Objectivity of contractual intention.....	440
	(b) <i>Parol evidence rule</i> .....	443
<b>CHAPTER 9 Implied Terms .....</b>		<b>451</b>
9.1	Implied Terms Generally .....	451
9.2	Terms Implied by Necessity .....	451
	(a) <i>Business efficacy</i> .....	451
	(b) <i>Five conditions for implied terms</i> .....	454

	(c) <i>Reasonableness of term insufficient</i> .....	458
	(d) <i>Relationship between conditions and varieties of implied terms</i> .....	463
	Terms implied by necessity and terms implied to establish what the contract is .....	463
	Terms implied by industry usage and market custom .....	467
	(e) <i>Third party performance of obligations</i> .....	469
	(f) <i>Fettering legislative and executive power</i> .....	473
9.3	Terms Implied by Legislation .....	475
<b>CHAPTER 10 Conditions, Warranties and Innominate Terms .....</b>		<b>479</b>
10.1	Classification of Terms .....	479
10.2	Conditions and Warranties.....	480
	(a) <i>Intention of the parties</i> .....	480
	(b) <i>Consequence of breaching a condition</i> .....	485
	(c) <i>Time of the essence</i> .....	485
	(d) <i>Specifying consequences of breach</i> .....	490
10.3	Innominate Terms .....	494
<b>CHAPTER 11 Exemption Clauses .....</b>		<b>505</b>
11.1	Nature of Exemption Clauses .....	505
11.2	Incorporation of Exemption Clauses .....	506
11.3	Interpretation of Exemption Clauses .....	507
	(a) <i>Natural and ordinary meaning</i> .....	507
	(b) <i>Contra proferentum</i> .....	510
	(c) <i>Exemption from liability for negligence</i> .....	512
	(d) <i>Exemption from liability for deliberate breach</i> .....	518
	(e) <i>Less strict scrutiny of limitation clauses</i> .....	524
11.4	Ineffectiveness of Certain Exemption Clauses at Common Law .....	526
	(a) <i>Misrepresentation</i> .....	526
	(b) <i>Inconsistent undertakings</i> .....	528
	(c) <i>Third parties</i> .....	528
	(d) <i>'Fundamental breach'</i> .....	529
11.5	Legislative Control of Exemption Clauses .....	534
	(a) <i>Control of Exemption Clauses Ordinance</i> .....	534
	Negligence liability.....	534
	Liability for breach of contract.....	542
	Contracts to which sections 7 and 8 do not apply .....	545
	Manufacturer's liability .....	546
	Sale of goods .....	546
	(b) <i>Supply of Services (Implied Terms) Ordinance</i> .....	548
	(c) <i>Misrepresentation Ordinance</i> .....	549
<b>CHAPTER 12 Misrepresentation.....</b>		<b>551</b>
12.1	Introduction to Misrepresentation.....	551

12.2	Elements of Misrepresentation .....	552
(a)	<i>False statement of fact — opinion, forecast and future intention</i> .....	552
(b)	<i>Misrepresentation by conduct</i> .....	556
(c)	<i>Misrepresentation by silence</i> .....	559
(d)	<i>Inducement to conclude contract and failure to verify</i> .....	565
(e)	<i>Multiple inducements to conclude contract</i> .....	568
12.3	Remedies for Misrepresentation .....	568
(a)	<i>Rescission</i> .....	568
(b)	<i>Damages</i> .....	575
(c)	<i>Misrepresentation Ordinance (Cap 284)</i> .....	578
	Section 3(1).....	578
	Section 3(2).....	582
<b>CHAPTER 13 Mistake .....</b>		<b>587</b>
13.1	Introduction to Mistake .....	587
13.2	Mutual Mistake .....	589
13.3	Common Mistake .....	590
(a)	<i>Common mistake at common law</i> .....	590
(b)	<i>Common mistake in equity</i> .....	599
	Rise of common mistake in equity .....	599
	Fall of common mistake in equity .....	601
	Rescission in equity .....	609
13.4	Unilateral Mistake.....	610
(a)	<i>Onus</i> .....	612
(b)	<i>Knowledge of non-mistaken party</i> .....	613
(c)	<i>Unilateral mistake must concern contractual term</i> .....	624
(d)	<i>Remedies for unilateral mistake</i> .....	627
13.5	Identity Mistake .....	628
13.6	Rectification .....	637
(a)	<i>Common mistake: objective agreement, not subjective intentions</i> .....	637
(b)	<i>Common mistake: concluded agreements and common continuing intentions</i> .....	640
(c)	<i>Unilateral mistake</i> .....	641
(d)	<i>Standard of proof</i> .....	645
13.7	Non Est Factum .....	647
<b>CHAPTER 14 Duress, Undue Influence and Unconscionability .....</b>		<b>657</b>
14.1	Duress .....	657
(a)	<i>Duress to the person</i> .....	658
	Duress to the person and causation.....	658
(b)	<i>Duress to property</i> .....	663
(c)	<i>Economic duress</i> .....	663
	Origins .....	663
	Nature of pressure — coercive and illegitimate .....	665

	Causation — no practical choice .....	671
14.2	Undue Influence .....	679
(a)	<i>Classes of undue influence</i> .....	680
(b)	<i>Actual undue influence</i> .....	681
(c)	<i>Presumed undue influence</i> .....	682
(d)	<i>Undue influence and third parties</i> .....	696
14.3	Unconscionability .....	708
(a)	<i>Unconscionability in equity</i> .....	708
(b)	<i>Unconscionability in legislation</i> .....	720
<b>CHAPTER 15 Illegality and Public Policy .....</b>		<b>735</b>
15.1	Introduction to Illegality .....	735
15.2	Contracts Illegal or Void at Common Law .....	735
(a)	<i>Contracts to commit a legal wrong</i> .....	735
(b)	<i>Contracts contrary to public policy</i> .....	739
	Illegality under foreign law .....	739
	Administration of justice .....	739
	International obligations .....	740
	Contracts procured corruptly .....	740
	Public morality .....	741
	Secret cartels.....	745
	Restraint of trade .....	746
	<i>Overview of restraint</i> .....	746
	<i>Interests to be protected</i> .....	747
	<i>Temporal scope</i> .....	751
	<i>Geographic scope and material scope</i> .....	754
	<i>Mutuality</i> .....	757
	<i>Unreasonable deterrent from resigning employment</i> .....	758
	<i>Sale of business and goodwill</i> .....	758
	<i>Adequacy of consideration</i> .....	759
15.3	Contracts Affected by Legislation .....	760
15.4	Consequences of Invalidity .....	761
(a)	<i>Contracts illegal at common law</i> .....	761
(b)	<i>Contracts illegal by legislation</i> .....	761
(c)	<i>Void and illegal contracts contrasted</i> .....	766
	Intention.....	766
	Severance.....	766
	Related agreements.....	768
(d)	<i>Locus poenitentiae</i> .....	769
	Timely repudiation .....	769
	Voluntariness .....	773
<b>CHAPTER 16 Privity .....</b>		<b>775</b>
16.1	General Rule as to Privity at Common Law .....	775
16.2	Exceptions at Common Law .....	781
(a)	<i>Exemption clauses and agency in shipping contracts</i> .....	782

	(b) Assignment of choses in action .....	792
	(c) Covenants concerning land .....	797
	(d) Insurance contracts .....	797
16.3	Legislative Reform.....	797
	(a) Third party's rights of enforcement.....	798
	(b) Third party's remedies.....	799
	(c) Proceedings brought by third party and defence or set-off by promisor.....	800
	(d) Proceedings brought against third party .....	801
	(e) Double liability .....	801
	(f) Arbitration .....	802
	(g) Rescission and variation of contract .....	802
	(h) Exclusive jurisdiction clauses.....	803
	(i) Assignment of third party rights .....	804
	(j) Limitation of actions .....	804
<b>CHAPTER 17 Discharge by Frustration.....</b>		<b>805</b>
17.1	Absolute Contract and Impossibility of Performance.....	805
17.2	Frustration and Implied Term Theory.....	806
17.3	Radical Transformation of Bargain Theory.....	810
17.4	Scope of Frustration .....	814
	(a) Performance rendered impossible .....	814
	(b) Death or incapacity .....	815
	(c) Illegality.....	815
	(d) Non-occurrence of anticipated event .....	817
	(e) Impossibility of agreed mode of performance .....	821
	(f) Change of commercial context .....	821
	(g) Contract terms altered by legislation .....	827
17.5	Express Provision for Frustrating Events .....	828
17.6	Foreseen Events Without Express Contractual Provision .....	832
17.7	Self-induced Frustration.....	837
17.8	Frustration and Leases .....	841
17.9	Consequences of Frustration.....	847
<b>CHAPTER 18 Discharge by Performance, Agreement and Breach .....</b>		<b>859</b>
18.1	Discharge of Contract .....	859
18.2	Discharge by Performance .....	859
18.3	Discharge by Agreement .....	860
18.4	Discharge by Breach .....	860
	(a) Repudiation.....	860
	(b) Anticipatory breach .....	866
	(c) Election of non-breaching party.....	868
	Acceptance of repudiation or continuation with contract.....	868
	Prevention principle.....	870
	Requirement to accept repudiation.....	875

	(d) Acceptance of repudiation.....	881
	(e) Affirmation of contract .....	888

<b>CHAPTER 19 Remedies for Breach of Contract .....</b>		<b>893</b>
19.1	Introduction.....	893
19.2	Two Interests Protected by Damages.....	894
19.3	Performance Interest .....	894
	(a) Performance interest illustrated.....	894
	(b) Limiting damages for loss of performance interest .....	895
	(c) Remoteness .....	896
	(d) Mitigation of loss.....	917
	(e) Contributory negligence .....	919
19.4	Reliance Interest.....	922
19.5	Agreed Damages and Penalty Clauses.....	929
19.6	Non-refundable Deposits and Advance Payments.....	941
19.7	Non-pecuniary Losses.....	946
19.8	Specific Performance .....	951
19.9	Injunction .....	956
Index .....		961