

Contents

Preface to third edition	v
Preface to first edition	vii
Table of cases	xxiii
Table of statutes	lxvii
Abbreviations	lxxiii
1 Introduction	1
1.1 Nature of 'Contract'	1
1.2 Freedom and Sanctity of Contract	2
1.3 Sources of Contract Law in Hong Kong	4
1.4 Structure of Book	7
2 Agreement	9
2.1 Introduction	9
2.2 Parties	10
2.3 Offer	12
2.3.1 Definition	12
2.3.2 Determining Existence of Offer	14
2.3.3 How is Offer Made	25
2.3.4 To Whom Offer is Made	27
2.3.5 When Offer is Made	27
2.3.6 Where Offer is Made	28
2.4 Acceptance	29
2.4.1 Definition and Capacity	29
2.4.2 Determining Existence of Acceptance	29
2.4.3 Counter-offer	31
2.4.4 Subsequent Negotiations	31
2.4.5 How is Acceptance Effected	32
2.4.6 Location of Acceptance	45
2.4.7 Acceptance in Ignorance of Offer	46
2.4.8 Acceptance of Tender	48
2.4.9 Termination of Offer	49
2.5 Certain and Complete Agreement	59
2.5.1 Uncertainty in Essential Terms	59
2.5.2 Saving Agreements from Uncertainty	62
2.6 Objective Standard	80

2.7	Battle of Forms	83
2.8	Special Cases	84
2.8.1	Multi-party Contracts	85
2.8.2	Insurance Contracts	86
2.8.3	Conditional Agreements	87
3	Consideration	91
3.1	Requirement of Consideration	91
3.2	Definitions	92
3.2.1	Common Definitions	92
3.2.2	Executed and Executory Consideration	93
3.2.3	Legal and Practical Benefit	94
3.3	Value in the Eyes of the Law	97
3.3.1	Economic Value	97
3.3.2	Adequacy	97
3.3.3	Discharge of Public Duty	99
3.3.4	Discharge of Existing Contractual Obligation Owed to the Promisor	102
3.3.5	Discharge of Existing Contractual Obligation Owed to a Third Party	112
3.3.6	Compromise of Legal Action	115
3.3.7	Assumption of Liability	118
3.3.8	Past Consideration	118
3.3.9	Impossible, Illusory and Illegal Consideration	121
3.4	Consideration Must Move from Promisee at Promisor's Request	122
3.4.1	Consideration and Privity	122
3.4.2	Moving from Promisee	123
3.4.3	Multiple Promisees	125
3.4.4	Consideration Moving to Third Party	127
3.4.5	At Promisor's Request	128
3.4.6	Agency	129
3.4.7	Practical Benefit	129
3.5	Problem Areas	130
4	Intention	133
4.1	Requirement of Intention	133
4.2	Domestic Agreements	134
4.2.1	Domestic Agreements of an Amicable Household	135
4.2.2	Domestic Agreements of a Non-amicable Household	137

4.2.3	Other Close Family Relationships	137
4.2.4	Nature and Consequences of Transaction More Important than Family or Social Relationship	139
4.3	Commercial Agreements	142
4.3.1	Contractual Intention Presumed	142
4.3.2	Statements Preceding Contract	143
4.3.3	Expressly Negating Contractual Intention	145
4.3.4	Letters of Intent and Letters of Comfort	146
4.3.5	'Subject to Contract'	149
4.3.6	Some Employment Arrangements	149
4.4	Effect of Intention	150
5	Form of Contract	151
5.1	Formalities	151
5.2	General Rule	152
5.3	Contracts Under Seal	153
5.3.1	Transactions Affected	153
5.3.2	Deeds	154
5.4	Contracts in Writing or Evidenced in Writing	158
5.4.1	Contracts in Writing	158
5.4.2	Contracts Evidenced in Writing: Land	158
5.4.3	Other Contracts Requiring Writing	174
5.5	Electronic Signatures	178
5.6	Notification and Registration	179
5.6.1	Purposes	179
5.6.2	Money Lending	179
5.6.3	Bills of Sale	180
5.6.4	Apprenticeships	180
6	Contents of Contract	181
6.1	Terms of the Contract	181
6.1.1	Terms	181
6.1.2	Statements With No Legal Consequences	182
6.1.3	Pre-contractual Statements: Terms and Representations	183
6.1.4	Terms and Collateral Warranties	188
6.2	Incorporation of Express Terms	193
6.2.1	Proof of Terms	193
6.2.2	Parol Evidence Rule	206
6.2.3	Construction of Terms	213

6.3	Implied Terms	223
6.3.1	Implied Terms Generally	223
6.3.4	Three Varieties of Implied Terms	228
6.3.5	Relationship Between Conditions and Varieties of Implied Terms	232
6.3.6	Industry Usage and Market Custom	232
6.3.7	Third Party Performance of Contractual Obligations	234
6.3.8	Commission Contracts	235
6.3.9	Fettering Legislative and Executive Power	237
6.3.10	Terms Implied by Legislation	239
6.4	Classification of Terms	239
6.4.1	Types of Terms	239
6.4.2	Conditions and Warranties	240
6.4.3	Innominate Terms	246
6.4.4	'Fundamental' Terms	250
6.5	Judicial Control of Exemption Clauses	250
6.5.1	Nature of Exemption Clauses	250
6.5.2	Incorporation of Exemption Clauses	252
6.5.3	Interpretation of Exemption Clauses	253
6.5.4	Ineffectiveness of Certain Exemption Clauses at Common Law	260
6.6	Legislative Control of Exemption Clauses	268
6.6.1	Judicial and Legislative Control Contrasted	268
6.6.2	Control of Exemption Clauses Ordinance	268
6.6.3	Supply of Services (Implied Terms) Ordinance	283
6.6.4	Misrepresentation Ordinance	283
7	Misrepresentation	285
7.1	Vitiating of Contracts	285
7.2	Introduction to Misrepresentation	286
7.2.1	Types of Misrepresentation	287
7.2.2	Misrepresentation Ordinance	290
7.3	What Constitutes Operative Misrepresentation	291
7.3.1	Types of Statement	291
7.3.2	Clear Statement	298
7.3.3	Material Statement	298
7.3.4	Inducement	299
7.3.5	How a Representation is Made	303
7.3.6	Privity	311
7.3.7	Exemption Clauses	312

7.4	Negligent Misrepresentation	312
7.4.1	No Contractual Relationship Between Representor and Representee	312
7.4.2	Contractual Relationship Between Representor and Representee	319
7.5	Remedies	320
7.5.1	Rescission	320
7.5.2	Damages at Common Law	327
7.5.3	Misrepresentation Ordinance	331
7.5.4	Representation Incorporated as Term of Contract	336
7.6	Duty to Disclose	338
7.6.1	Fiduciary Relations	338
7.6.2	Contracts Uberrimae Fidei	339
7.6.3	Statutory Duty of Disclosure	341
8	Mistake	343
8.1	Introduction to Mistake	343
8.2	Mistake at Common Law	344
8.2.1	Mutual Mistakes	344
8.2.2	Common Mistakes	345
8.2.3	Unilateral Mistakes	358
8.2.4	Effect of Operative Mistake	370
8.3	Mistake in Equity	371
8.3.1	Emergence of Mistake in Equity	371
8.3.2	Relation Between Mistake at Law and Mistake in Equity	373
8.3.3	Types of Mistake in Equity	373
8.3.4	Effect of Mistake in Equity	375
8.3.5	End of Mistake in Equity?	377
8.4	Rectification	379
8.4.1	Rectification and Mistake	379
8.4.2	Proof	385
8.4.3	Agreements Concerning Land	386
8.4.4	Limitations	387
8.5	Non Est Factum	387
8.5.1	What is Non Est Factum	387
8.5.2	Availability	387
8.5.3	Effect	391
8.6	Alternative Theories	392

9	Duress, Undue Influence and Unconscionability	395
9.1	Introduction	395
9.2	Duress	395
9.2.1	Nature of Duress	395
9.2.2	Types of Duress	397
9.2.3	Types of Improper Threat	401
9.2.4	Degree of Pressure	407
9.2.5	Availability of Alternatives for the Person Subject to Duress	408
9.2.6	Protest	410
9.2.7	Availability of Alternatives for the Person Exerting Duress	411
9.2.8	Lawful-act Pressure and Unconscionability	412
9.2.9	Causation	413
9.2.10	By Whom is Duress Exerted	414
9.2.11	Effect	414
9.3	Undue Influence	414
9.3.1	Nature of Undue Influence	414
9.3.2	Classes of Undue Influence	416
9.3.3	Actual Undue Influence	417
9.3.4	Presumed Undue Influence	418
9.3.5	Wrongfulness of Transaction	420
9.3.6	Undue Influence and Third Parties	423
9.3.8	Effect	426
9.3.9	Validating Transaction	426
9.4	Unconscionable Bargains	428
9.4.1	Development of the Principle of Unconscionability	428
9.4.2	Expectant Heirs	428
9.4.3	Inequality of Bargaining Power	429
9.4.4	Unconscionability in Equity	430
9.4.5	Unconscionable Contracts Ordinance	432
10	Incapacity	437
10.1	Minors	437
10.1.1	Contractual Liability of Parents	437
10.1.2	Age of Contractual Capacity	437
10.1.3	Categories of Minors' Contracts	438
10.1.4	Fraud Committed by Minor	447
10.1.5	Other Liability	447
10.1.6	District Court Litigation	449
10.1.7	Guarantees of Minors' Contracts	450

10.2	Women	451
10.3	Mentally Disordered Persons	451
10.3.1	Conditions for Relief	451
10.3.2	Lucid Intervals	452
10.3.3	Ratification	452
10.3.4	Recoupment of Necessaries from Estate	452
10.4	Drunken Persons	452
10.5	Unconscionability, Mentally Disordered Persons and Drunken Persons	453
10.6	Corporations	453
10.6.1	Types of Corporation	453
10.6.2	Ultra Vires Rule	454
10.6.3	Attempted Evasion of Ultra Vires Rule	455
10.6.4	Objects and Powers	456
10.6.5	Directors' Exercise of Corporate Powers	456
10.6.6	Abuse of Powers by Directors and Ultra Vires	458
10.6.7	Relationship Between Acts Ultra Vires and Absence of Benefit to the Company	461
10.6.8	Reform of Ultra Vires Rule	462
11	Illegality	465
11.1	Introduction	465
11.2	Illegality in Formation or Purpose	465
11.2.1	Commission of Crime or Tort	466
11.2.2	Breach of Legislation	472
11.2.3	Public Policy	480
11.3	Illegality in Performance	512
11.3.1	Both Parties Knew of Illegality	512
11.3.2	Only One Party Knew of Illegality	514
11.4	Gaming and Wagering	515
11.4.1	Gambling Ordinance	515
11.4.2	Gaming	516
11.4.3	Wagering	516
11.4.4	Bookmaking	520
11.5	Effect of Illegality	521
11.5.1	Severance	521
11.5.2	Voidness	523
11.5.3	Enforcement	523
11.5.4	Related Agreements	525
11.5.5	Recovery of Property and Money	525

12	Joint Obligations and Joint Rights	527
12.1	Introduction	527
12.2	Debtors	527
12.2.1	Types of Debtor	527
12.2.2	Presumptions	528
12.2.3	Legal Proceedings	528
12.2.4	Death of Debtor	529
12.2.5	Defences of Debtor	530
12.2.6	Release, Variation, Merger	530
12.2.7	Contribution	532
12.2.8	Guarantee	533
12.3	Creditors	533
12.2.1	Types of Creditor	533
12.3.2	Presumptions	534
12.3.3	Legal Proceedings	534
12.3.4	Death of Creditor	535
12.3.5	Defences Against Creditor	535
12.3.6	Payment to Creditor	536
12.3.7	Release	536
13	Privity	537
13.1	General	537
13.1.1	Statement of the Privity Rule	537
13.1.2	Privity and Consideration	538
13.1.3	Operation of the Privity Rule	539
13.1.4	Remedies of Promisee	540
13.1.5	Rights Between Promisee and Third Party	542
13.1.6	Separate Contracts	543
13.2	Exceptions to the Privity Rule	544
13.2.1	Land	545
13.2.2	Agency	545
13.2.3	Assignment	545
13.2.4	Trust	545
13.2.5	Insurance Contracts and Privity	545
13.2.7	Legislative Exceptions	548
13.3	Effect of Contract on Third Parties	549
13.3.1	Liability to Third Parties for Negligent Breach of Contract	550
13.3.2	Exemption Clauses	554
13.3.3	Interference with Contractual Rights	563
13.3.4	Purchase of Items Subject to Restraints	565

13.4	Reform of Privity	568
13.4.1	Reform: Proposals and Justification	568
13.4.2	Contracts (Rights of Third Parties) Bill 2013	573
14	Assignment	577
14.1	General	577
14.1.1	Definitions	577
14.1.2	History	577
14.1.3	Distinguished from Other Transactions	578
14.2	General Requirements	580
14.2.1	Subject Matter	580
14.2.2	Intention	580
14.2.3	Consideration	582
14.2.4	Absolute Assignment	584
14.2.5	Writing	585
14.2.6	Notice to Assignee	585
14.2.7	Notice to Debtor	585
14.2.8	Registration and Public Notice	587
14.3	Effect of Assignment	588
14.3.1	Payment by Debtor	588
14.3.2	Who May Sue	588
14.3.3	Assignee Takes Subject to Equities	588
14.3.4	Burden	591
14.4	Rights Not Assignable	592
14.4.1	By Agreement	592
14.4.2	Personal Contracts	594
14.4.3	Bare Rights of Action	595
14.4.4	Public Policy	595
14.5	Assignment by Operation of Law	596
15	Performance	597
15.1	General Rules	597
15.1.1	What is Required to be Performed	597
15.1.2	Time of Required Performance	598
15.1.3	Place of Performance	605
15.1.4	By Whom Performance is Required	605
15.2	Timeliness	608
15.2.1	General Rules	608
15.2.2	Extension of Time	615
15.2.3	Application of De Minimis Rule	615
15.2.4	Time for Satisfaction of Conditions Precedent to Contract	616

15.2.5	Delay	616
15.2.6	Options	616
15.3	Payment	617
15.3.1	Legal Tender	617
15.3.2	Currency Devaluation	617
15.3.3	Payment by Cheque/Letter of Credit/Credit Card	617
15.3.4	Appropriation	618
15.4	Partial Performance	619
15.4.1	Definitions	619
15.4.2	Entire Obligations	620
15.4.3	Severable Obligations	621
15.4.4	Acceptance of Partial Performance	622
15.4.5	Substantial Performance	622
15.5	Tender	624
15.5.1	Nature and Effect of Tender	624
15.5.2	Rules	625
16	Discharge and Variation by Agreement	627
16.1	Introduction	627
16.2	Release	627
16.2.1	Nature of Release	627
16.2.2	Formal Requirements	628
16.2.3	Consideration	628
16.2.4	Construction of a Release	628
16.3	Accord and Satisfaction	629
16.3.1	Nature of Accord and Satisfaction	629
16.3.2	Formal Requirements	629
16.3.3	Consideration	629
16.3.4	Part Payment of Debt	630
16.4	Rescission by Agreement	636
16.4.1	Nature of Rescission by Agreement	636
16.4.2	Formal Requirements	636
16.4.3	Consideration	637
16.5	Variation	637
16.5.1	Nature of Variation	637
16.5.2	Formal Requirements	640
16.5.3	Consideration	641
16.6	Waiver	641
16.6.1	Nature of Waiver	641
16.6.2	Formal Requirements	642
16.6.3	Consideration	642

16.6.4	Requisites	643
16.6.5	Effect	643
16.7	Discharge by Terms of Contract	645
17	Discharge by Frustration	647
17.1	Theoretical Basis	647
17.2	Events of Frustration	649
17.2.1	Impossibility of Performance	649
17.2.2	Failure of Commercial Purpose	655
17.2.3	Supervening Illegality	659
17.2.4	Frustration and Allocation of Risk	661
17.3	Effects of Frustration	669
17.3.1	Common Law	669
17.3.2	Legislative Provisions	670
18	Discharge by Breach	673
18.1	Terminology	673
18.2	Failure to Perform and Breach	674
18.3	Types of Qualifying Breach	674
18.3.1	Substantial Failure	674
18.3.2	Other Types of Qualifying Breach	681
18.3.3	Repudiation	683
18.3.4	Anticipatory Breach	687
18.4	Exercising Right to Terminate	690
18.4.1	Requirement to Accept Breach	690
18.4.2	Affirmation	691
18.4.3	Prevention Principle	691
18.4.4	Non-performance as Acceptance of Breach	692
18.4.5	Delay in Accepting Breach	693
18.5	Nature and Consequences of Discharge	694
18.5.1	Future Primary Obligations	695
18.5.2	Past Primary Obligations	695
18.5.3	Damages	696
18.5.4	Guarantors	696
19	Remedies	699
19.1	Introduction	699
19.2	Damages	700
19.2.1	Object of Damages	700
19.2.2	Types of Loss	705
19.2.3	Quantification	712

19.2.4	Limitation	727
19.2.5	Agreed Damages	746
19.2.6	Particular Rules	760
19.3	Specific Relief	765
19.3.1	Action for an Agreed Sum	765
19.3.2	Specific Performance	769
19.3.3	Injunction	782
19.4	Other Remedies	788
19.4.1	Declaration	788
19.4.2	Damages in Lieu of Specific Performance or Injunction	789
19.5	Interlocutory Proceedings	789
19.6	Election and Combination of Remedies	793
19.6.1	Freedom in Presenting Case	793
19.6.2	Heads of Damages	794
20	Limitation of Actions	797
20.1	Rationale	797
20.2	Limitation Ordinance	797
20.2.1	Simple Contracts	797
20.2.2	Specialties	798
20.2.3	Actions for Account	798
20.2.4	Restitutionary Claims	798
20.2.5	Arbitration Awards	799
20.2.6	Judgment	799
20.2.7	Government	799
20.2.8	Special Legislation	800
20.2.9	Accrual of Action	800
20.2.10	Nature of Limitation	811
20.3	Equity	812
20.3.1	Affirmation	812
20.3.2	Waiver (Election)	813
20.3.3	Acquiescence	813
20.3.4	Laches	813
20.3.5	Lapse of Time	815
20.3.6	Performance of Contract	816
20.3.7	Restitution Impossible	816
20.3.8	Third Parties	818
20.3.9	Judgment	819

21	Estoppel	821
21.1	Introduction	821
21.2	Estoppel by Representation	822
21.2.1	Requisites	822
21.2.2	Representation by Words	822
21.2.3	Representation by Conduct	823
21.2.4	Alteration of Position	824
21.2.5	Detriment	825
21.2.6	Estoppel Against Estoppel	825
21.2.7	Measure of Recovery	825
21.3	Estoppel by Convention	826
21.4	Promissory Estoppel	829
21.4.1	Terminology	829
21.4.2	Emergence of Promissory Estoppel	830
21.4.3	Subsequent Refinement	832
21.4.4	Present Scope	833
21.5	Proprietary Estoppel	848
21.5.1	Confined to Proprietary Interests	848
21.5.2	Representation or Promise	849
21.5.3	Detrimental Reliance	851
21.5.4	Effect of Estoppel	852
21.6	Estoppel and Public Duty	852
22	Unjust Enrichment	855
22.1	Introduction	855
22.1.1	Emergence of Unjust Enrichment	855
22.1.2	Benefit	858
22.1.3	Failure of Consideration	860
22.1.4	Benefits Conferred 'Under the Contract'	862
22.1.5	Contract Ceiling	862
22.2	Non-Concluded Agreement	862
22.2.1	Terminated Negotiations	863
22.2.2	Uncertainty or Incompleteness	865
22.2.3	Want of Authority	866
22.2.4	Extra Goods and Services	867
22.3	Non-Compliance with Formal Requirements	867
22.3.1	Land	867
22.3.2	Money Lending	868
22.3.3	Bills of Sale	868
22.4	Mistake	869
22.5	Misrepresentation, Duress, Undue Influence and Unconscionability	869

22.6	Incapacity	869
22.6.1	Minors	869
22.6.2	Corporations	871
22.7	Illegality	873
22.8	Discharge by Breach	874
22.8.1	Position of Non-breaching Party	874
22.8.2	Position of Defaulting Party	875
22.9	Discharge by Frustration	877
22.10	Restitution as a Remedy for Breach of Contract	877
23	Conflict of Laws	879
23.1	Doctrine of Proper Law	879
23.1.1	Ascertaining the Proper Law	880
23.1.2	Agreeing the Proper Law	881
23.1.3	Closest and Most Real Connection	882
23.1.4	Scope of and Limitation on Proper Law	883
23.2	Application of Proper Law and Other Laws	883
23.2.1	Formal Requirements for Formation of Contract	884
23.2.2	Substantive Requirements for Formation of Contract	884
23.2.3	Capacity	884
23.2.4	Essential Validity	885
23.2.5	Illegality	885
23.2.6	Construction	886
23.2.7	Performance	886
23.2.8	Discharge	886
23.2.9	Remedies	886
23.2.10	Limitation of Actions	887
23.3	Foreign Currency Obligations	887
23.3.1	Money of Account	887
23.3.2	Nominalism and Protection of Currency Value	888
23.3.3	Currency of Payment	888
23.3.4	Judgment	889
23.4	Foreign Judgment	891
Index		895

Table of Cases

	PAGE		PAGE
A C Controls Ltd v British Broadcasting Corp (2003)	146	Afovos Shipping Co SA v R Pagnan and F Lli, The Afovos (1982)	603, 682, 683
A H Hudson 'Gibbons v Procter Revisited' (1968)	46	AG Securities v Vaughan (1990)	150
A Roberts & Co Ltd v Leicestershire County Council (1961)	380, 381	Agroexport State Enterprises v Compagnie Europeene de Cereales (1974)	88
A Schroeder Music Publishing Co v Macaulay (Formerly Instone) (1974)	500, 506	Aillion v Spiekermann (1976)	523, 524
A Solicitor v Law Society of Hong Kong (2008)	5, 6, 7	Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd (1983)	219, 260, 273
A to Z Bazaars (Pty) Ltd v Minister of Agriculture (1974)	42	AJ Bekhor & Co Ltd v Bilton (1981)	793
A Tomlinson (Hauliers) Ltd v Hepburn (1966)	547	Ajayi v RT Briscoe (Nigeria) Ltd (1964)	833, 844
A/S Awilco v Fulvia SpA, The Chikuma (1981)	617, 683	Akerhielm v de Mare (1959)	288, 298
Aaron's Reefs Ltd v Twiss (1896)	306	Aktieselskabet Dansk Skibsfinansiering v Brothers (2000)	289, 308
Abbott v Hendricks (1840)	207	Al Nakib Investments (Jersey) Ltd v Longcroft (1990)	317
Aberfoyle Plantations Ltd v Cheng (1960)	616	Al Saudi Banque v Clarke Pixley (1990)	316
Adam Opel GmbH v Mitras Automotive (UK) Ltd (2007)	106	Alan Estates Ltd v W G Stores Ltd (1982)	156
Adam v Newbigging (1888)	321, 325, 817	Albacruz (Cargo Owners) v Albazero (Owners), The Albazero (1977)	702
Adams v Lindsell (1818)	28, 40	Alder v Moore (1961)	759
Adamson v Jarvis (1827)	512	Alderslade v Hendon Laundry (1945)	255
Addis v Gramophone Co Ltd (1909)	704, 708, 709	Alec Lobb (Garages) Ltd v Total Oil (Great Britain Ltd (1985))	502
Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd (1934)	887	Alexander v Rayson (1936)	466
Adelfamar SA v Silos e Mangimi Martini SpA, The Adelfa (1988)	653, 663	Alexander v Steinhardt, Walker & Co (1903)	585
Adler v Dickson (1955)	262, 556	Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd (1936)	726
Advanced Chemicals Ltd v Centaline Property Agency Ltd (Unreported, 31 August 2001)	166	Al-Kandari v JR Brown & Co (1988)	552
Advertasia Street Furniture Ltd v China Outdoor Media Investment (Hong Kong) Co Ltd (2006)	88	Allcard v Skinner (1887)	415, 419, 420, 421, 426, 813, 814
Aerial Advertising Co v Batchelor's Peas Ltd (1938)	679, 691	Allcard v Walker (1896)	374, 375
		Allen v Flood (1898)	405