

IN-DEPTH

# Complex Commercial Litigation

HONG KONG



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# Complex Commercial Litigation

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In-Depth: Complex Commercial Litigation (formerly The Complex Commercial Litigation Law Review) is a useful global overview of the core principles and recent developments concerning the fundamental legal issues likely to feature in complex commercial disputes, wherever they may arise. It examines key topics including contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud and misrepresentation; dispute resolution; remedies; and much more.

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# Hong Kong

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## Introduction

The High Court Ordinance (Cap. 4) and Rules of the High Court (Cap. 4A) (along with guidance that includes the Practice Directions issued by the Hong Kong Judiciary) apply to civil litigation in the High Court of Hong Kong. These rules, which govern procedures ranging, inter alia, from pleadings to evidence, witnesses and costs, are robust and provide a clear framework for the resolution of disputes. Commercial arbitration is also an extremely popular method of resolving cross-border, international disputes, along with other modes of alternative dispute resolution such as mediation.

When deciding on contractual matters, the courts have always sought to uphold the express terms of valid contracts. The courts focus on the language used when looking at contracts and, in broad terms, absent ambiguity, that language will determine each party's obligations. In light of this approach, to date, the courts have rejected a general implied term of good faith in commercial contracts.

Much of the law governing commercial disputes has evolved through case law and through statute. Relevant statutes in the commercial context include the Misrepresentation Ordinance (Cap. 284), the Control of Exemption Clauses Ordinance (Cap. 71), the Sale of Goods Ordinance (Cap. 26), the Limitation Ordinance (Cap 347) and the Contracts (Rights of Third Parties) Ordinance (Cap. 623). Case law in Hong Kong derives from the common law previously in force in Hong Kong (including UK Privy Council decisions on appeal from Hong Kong) prior to its reunification on 1 July 1997. Although decisions of the House of Lords and the Privy Council (now the UK Supreme Court) delivered after 1 July 1997 are not strictly binding, they are treated as highly persuasive, and Hong Kong courts do not generally depart from such decisions unless jurisdiction-specific considerations prevail.

In addition to breach of contract claims, alternative causes of action are available, including torts relating to misrepresentation and economic loss, which offer claimants the opportunity, in some instances, to seek remedies beyond the relevant contract.

## Year in review

### Litigation and digitisation

Hong Kong courts are trending towards greater use of digital technology. The Court Proceedings (Electronic Technology) Ordinance (Cap. 638) provides for the phased implementation of the use of technology in Hong Kong court proceedings and court-related matters. E-courts in the magistrates' courts and for various case types in the District Court were implemented in 2022,<sup>[1]</sup> facilitated by the integrated court case management system (iCMS). While not applicable to interparty communications, the iCMS enables parties to send and receive case-specific court documents to and from the e-courts, inspect or search filed documents and other case-related information, search cause books and make electronic payments.<sup>[2]</sup> The iCMS is expected to be introduced to the Court of Final Appeal, the High Court and other specific courts and tribunals by the end of 2024, while mandatory use of iCMS by legal representatives for selected case types is proposed for 2026.<sup>[3]</sup> This

technological shift will continue to gain momentum as the courts maximise the benefit of digital tools to deliver savings in time, expense and complexity, which will also bring the Hong Kong courts in line with those in other key common law jurisdictions.

## Key case law and other developments

On 29 January 2024, the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) came into effect.<sup>[4]</sup> The Ordinance provides streamlined procedures for a judgment creditor to enforce a Hong Kong court decision in most civil and commercial matters in mainland China (and vice versa) by way of registration. Unlike the previous arrangement, a judgment creditor is no longer required to demonstrate that the parties agreed to designate either mainland China or Hong Kong as an exclusive jurisdiction for resolving disputes (e.g., by way of an exclusive jurisdiction clause). Instead, the judgment creditor only needs to show that the case has sufficient 'connection' with mainland China or Hong Kong.<sup>[5]</sup>

In the past year, the Hong Kong courts have handled a series of cases concerning the jurisdiction to wind up companies based on contracts that provide for a non-Hong Kong court forum (including arbitration). In *Re Guy Kwok-hung Lam*,<sup>[6]</sup> the Hong Kong Court of Final Appeal held that bankruptcy proceedings arising from a contract with a foreign exclusive jurisdiction clause should be dismissed or stayed pending determination of the dispute in the agreed forum under the exclusive jurisdiction clause, unless there were 'strong reasons' against such a stay or dismissal (e.g., prejudice is caused to third parties or the dispute borders on the frivolous or abuse of process). In April 2024, this decision was applied and extended in the two Court of Appeal cases of *Re Simplicity & Vogue Retailing (HK) Co Ltd*<sup>[7]</sup> and *Re Shandong Chenming Paper Holdings Ltd*.<sup>[8]</sup> In *Re Simplicity*, the approach in *Re Guy Kwok-hung Lam* has been extended to arbitration agreements in circumstances where the court is satisfied that the debtor has taken steps to indicate a 'genuine intention to arbitrate'. In *Re Shandong Chenming*, the Court of Appeal held that the approach in *Re Guy Kwok-hung Lam* extends to cross-claims (subject to arbitration clauses) relied upon by the debtor company in opposition to the winding-up petition.

The Hong Kong courts have also contributed some degree of certainty on novel issues arising from cryptocurrency disputes. In the case of *Re Gatecoin Ltd*,<sup>[9]</sup> the Court of First Instance expressly confirmed that cryptocurrency is 'property' that can be held on trust. In the case of *MANTRA DAO Inc*<sup>[10]</sup> the Hong Kong Court suggested that managers of decentralised autonomous organisations (DAOs) should be subject to some sort of 'duty to account', and granted an order compelling the managers to disclose the DAO's financial accounts.

Following *Monat Investment Ltd*, the Hong Kong courts have demonstrated a more policy-oriented approach to the issue of whether an illegality defence would bar a claim (on the facts, in the case of adverse possession). This is consistent with the position under English law, whereby if strong public policy concerns are involved, the court may steer away from a strict construction of the agreement and towards a more holistic interpretation based on statutory purpose and surrounding context.

In the same case, the Court of Appeal also indicated that lower courts in Hong Kong ought not to be bound by English precedents already overridden by the UK Supreme Court, such that the courts need not wait until a suitable case reaches the Hong Kong appellate courts

before ruling against the overridden English precedent. This statement demonstrates the pragmatism and robust attitude of the Hong Kong courts in bringing efficient and just resolutions to the case at hand.

## Contract formation

Under Hong Kong law, most contracts can be formed without any particular formality, and most contracts do not have to be written to be enforceable. Parties can create even complex contracts merely by satisfying the following criteria:

1. offer;
2. acceptance;
3. consideration;
4. intention to create legal relations; and
5. certainty of terms.

Most contracts can be formed orally, or by conduct, if the above criteria are met. It is, however, more difficult to evidence oral contracts (and the exact terms of any alleged agreement) without a written document.

### Offer and acceptance

The parties to a contract must have reached an agreement, objectively assessed. This is ordinarily performed when an offer from one party is accepted by the other.

For an offer to exist, the offer must be communicated to the offeree, and the offer must be specific, complete and capable of acceptance and made by the offeror with the intention of being bound by that offer. As such, an offer is distinguishable from an invitation to negotiate or an 'invitation to treat', such as an advertisement, where a seller invites a buyer to make an offer. An offer may be terminated by withdrawal, rejection<sup>[11]</sup> or lapse of time.

Acceptance is a final and unqualified expression of assent to the terms of an offer. It must be communicated to the offeror, and must correspond exactly with the terms of the original offer to be effective.

Acceptance can also take place by conduct. In this instance, it must be clear that the offeree performed the relevant act with the intention of accepting the offer.

### Consideration

Consideration is an essential component of a contract.<sup>[12]</sup> Although consideration does not have to be proportionate or adequate, it must have some value in the eyes of the law. An agreement without consideration is not a valid contract.

As a general rule, past consideration will not constitute good consideration.<sup>[13]</sup> If a party is simply satisfying a pre-existing obligation, it cannot rely upon that as consideration for new obligations being assumed by the other party.

The English Court of Appeal case of *Williams v. Roffey Bros*<sup>[14]</sup> cast some doubt upon this rule. In that case, a party encountered financial difficulties and sought additional payment to perform the contract without delay. The English Court of Appeal found that good consideration had been given for a promised additional payment as the promisee received a benefit in continuing the contract and avoiding delay. This decision has been criticised in several subsequent judgments.<sup>[15]</sup> Hong Kong courts have noted:

While *Williams*, albeit doubted, remains as an appellate precedent, the approach of the court in the UK and locally has been to read it in the context of the enforceability of a promise of extra payment or benefit in return for the promisee's performance of the existing contractual obligation to supply work or service.

In particular, it was held that the *Williams* approach is not preferred in the context of existing contractual obligations to pay a debt.<sup>[16]</sup>

### Intention to create legal relations

Without a mutual intention to create legal relations, there is no contract. When assessing whether such an intention exists, the court will consider the 'objective conduct of the parties as a whole' rather than their 'subjective state of mind'.<sup>[17]</sup> For commercial parties, there is a rebuttable presumption that each had an intention to create legal relations.

### Certainty of terms

There must be no ambiguity to the material terms of an alleged contract. Unless all the material terms are agreed with certainty, a contract is not binding.<sup>[18]</sup>

### Conditions precedent and subsequent

Parties entering into a contract may wish for certain requirements to be satisfied first, known as conditions precedent. Conditions precedent need not be labelled as such, but the wording must be clear that the performance of all or part of the contract is subject to the conditions precedent being satisfied.

Conditions subsequent are conditions that provide for a binding contract to be terminated (or no longer binding on one or both of the parties) if specified future events do or do not happen.

Parties are free to negotiate any conditions precedent and subsequent as they wish.

### Third-party beneficiaries

Under the Contracts (Rights of Third Parties) Ordinance (Cap. 623), any contract made on or after 1 January 2016, with a few exceptions, may confer an enforceable benefit on a third party (but, generally speaking, no contract can impose a duty on a third party). In order for a third party to obtain rights, it must be expressly identified in the contract by name, description or as a member of a class.<sup>[19]</sup> The third party may enforce a contractual

term either if the contract itself expressly provides that that third party possesses the right or if a term of the contract purports to confer a benefit on the third party.<sup>[20]</sup>

## Quantum meruit

If no binding contract exists, the putative parties to that alleged contract could still enforce their rights in certain circumstances. For example, a supplier of goods or services who has not been compensated by the recipient of those goods or services may be able to bring a claim of *quantum meruit* (as much as he has earned) to be paid for the goods or services provided, so long as the supplier can show that the recipient either expressly or impliedly requested the goods or services or freely accepted them.

## Contract interpretation

Under Hong Kong law, contractual interpretation is essentially ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. Although the courts have never taken an entirely literal or purposive approach to contractual interpretation, they are placing greater emphasis at present on the primacy of the language used by the parties in their agreement and consideration of the contract as a whole.<sup>[21]</sup> However, as the Court of Final Appeal acknowledged:

In the more difficult cases it is not particularly helpful to refer to the ‘ordinary and natural meaning’ of words because in such cases there can be much debate over exactly what is the ordinary or natural meaning of words; and in those cases the surer guide to interpretation is context.<sup>[22]</sup>

The courts have established that to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible, and they have typically ruled that they will adopt a broad test for establishing the admissible background.<sup>[23]</sup>

Other important points to note regarding the courts’ approach to contractual interpretation include the following:

1. in cases of ambiguity, the courts will try to interpret the contract in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;<sup>[24]</sup>
2. the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and
3. if a party drafted a clause for its own benefit, ambiguity in the meaning of the clause will generally be construed in favour of the other party (the *contra proferentem* rule).<sup>[25]</sup>

## Implied terms



Under Hong Kong law, the courts have the power to imply a term into a contract. The test for doing so is laid out in *BP Refinery (Westernpoint) Pty Ltd v. Shire of Hastings*.<sup>[26]</sup> A term may be implied if it:

1. is reasonable and equitable;
2. is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
3. is so obvious that it goes without saying;
4. is capable of clear expression; and
5. does not contradict any express term of the contract.<sup>[27]</sup>

The courts take a narrow approach when implying terms and will not read a term into a contract simply because it appears fair. Similarly, if the term is not necessary to make a contract work as intended by the parties, the court will not imply a term into a contract even if it is reasonable.<sup>[28]</sup>

## Dispute resolution

The resolution of commercial disputes in Hong Kong is largely conducted through the court system and, increasingly, through arbitration particularly in cross-border or international matters.

### Jurisdiction

A court must have jurisdiction to hear a dispute in order for a claimant to commence a claim before the court.<sup>[29]</sup> A defendant disputing the court's jurisdiction may apply for a declaration or order to that effect.<sup>[30]</sup> Contracting parties may, however, include an express jurisdiction clause in their agreement allowing them to choose which court has jurisdiction, and the Hong Kong courts may uphold such provisions.<sup>[31]</sup>

There are three principal types of jurisdiction clauses:

1. an exclusive jurisdiction clause, which specifies that the parties agree to refer any disputes to the courts of a chosen jurisdiction on an exclusive basis, and restricts either party from bringing proceedings against the other in the courts of any jurisdiction other than the one specified in the contract;
2. a non-exclusive jurisdiction clause, which enables either party to bring proceedings against the other either in the courts of the chosen jurisdiction or in the courts of any other jurisdiction (provided that court has jurisdiction over the dispute under its own rules);<sup>[32]</sup> and
3. an asymmetrical jurisdiction clause, which permits one of the parties (party A) to sue the other party (party B) in the courts of any competent jurisdiction, but restricts party B to bringing proceedings in only one jurisdiction.<sup>[33]</sup>

## Threshold requirements

When bringing a claim in the courts, a claimant must consider any threshold requirements for litigating the dispute. These will dictate whether a claim can be brought, and, if so, which court it should be brought in.

Other than a few excepted categories, monetary claims exceeding HK\$3 million are generally commenced in the Court of First Instance of the High Court. The District Court has non-exclusive jurisdiction over monetary claims in contract, quasi-contract or tort between HK\$75,000 and HK\$3 million. The Court of First Instance is required to transfer all or part of a claim (other than a counterclaim) that will likely fall within this threshold to the District Court unless it believes the action or proceeding should remain in the Court of First Instance due to the importance or complexity of any issue arising from such action or proceeding. Any such claims falling below HK\$75,000 are within the exclusive jurisdiction of the Small Claims Tribunal.

## Alternative dispute resolution

A number of alternative dispute resolution (ADR) mechanisms exist to allow parties to avoid court litigation completely or reach an early settlement. ADR can be prescribed as part of a contract, and Hong Kong courts will give effect to such an agreement provided that the clause is not null and void, inoperative or incapable of being performed.<sup>[34]</sup> If a party issues proceedings in breach of an ADR clause, the usual remedy will be a stay of those proceedings pending completion of the ADR process.<sup>[35]</sup>

Parties are encouraged to consider settlement at all times or risk costs sanctions. In the preliminary stages of litigation, the court will ask the parties whether they have considered mediation and, if they have not, adverse costs consequences may follow.<sup>[36]</sup> However, such consequences may not follow if the party has engaged in mediation to 'the minimum level of participation agreed to by the parties' or there is a 'reasonable explanation for not engaging in mediation'.<sup>[37]</sup>

The principal methods of ADR used in Hong Kong include:

1. negotiation, involving discussions and attempts to reach a settlement between the parties;<sup>[38]</sup>
2. mediation, an independent third-party mediator facilitating settlement negotiations; and
3. arbitration, a private and binding dispute resolution process before an impartial tribunal.

## Breach of contract claims

When one party to a valid contract does not comply with a particular term, its conduct may amount to a breach of the contract. The non-breaching party is then entitled to bring a

claim in relation to the breach and seek compensation – usually in the form of monetary damages. The burden is on the claimant to show, on the balance of probabilities, that there has been a breach of contract that has caused the loss (see further discussions in the subsection 'Causation' below on the question of causation).

### Termination for breach

Under Hong Kong law, a breach of contract does not automatically entitle the non-breaching party to terminate the contract. A repudiatory breach,<sup>[39]</sup> however, is a breach of contract that allows the non-breaching party to either treat the contract as continuing or as having come to an end.<sup>[40]</sup> Parties are also entitled to state explicitly that breach of a certain term results in termination, even if that right would not be provided under common law.

The non-breaching party can elect whether it will accept the breach and treat the contract as terminated or affirm the contract and require continued performance.

### Anticipatory breach

An anticipatory breach is when one party indicates, either by words or conduct, that it will not perform all or some of its obligations under the contract, such that the result of its performance will be substantially different from the requirements of the contract. If the anticipated breach would be a repudiatory breach (and it would be for the claimant to prove this), the non-breaching party is immediately entitled to terminate, without waiting for actual non-performance or breach.

The non-breaching party does not have to terminate the contract; it is also entitled to wait until the time fixed for performance in the hope that the other party will perform its contractual obligations or affirm the contract, if possible performing its own part of the contract and thereby claiming the contract price from the other party.

### Causation

To succeed in a breach of contract claim, the non-breaching party must show causation: that the breach is the effective or dominant cause of a loss.<sup>[41]</sup>

Causation may be complicated by a third party's intervening act or other event. If there is such an act or event between the breach of contract and the harm suffered that 'breaks the chain of causation', the court may hold the party in breach not liable for the loss.

## Defences to enforcement

Parties have several options to seek to avoid enforcement of contractual obligations or challenge claims of breach of contract in Hong Kong.

If a party can argue that a purported contract is invalid, it may have a complete defence to any attempted enforcement of that contract. A party's challenge to the validity of a contract, if successful, may render that contract void or voidable.<sup>[42]</sup>

A contract that lacks any of the key elements required for the formation of a valid contract is void. For example, a party who has not provided any consideration under a contract will be unable to enforce that contract's terms against another party. Other common instances that render a contract void include when a party lacks capacity or authority to enter that contract (e.g., an individual purporting to contract on behalf of a corporate entity without requisite authorisation).

## Force majeure and frustration

In certain types of contracts, contracting parties may choose to include a *force majeure* clause, which excuses performance of a contract following certain events that are beyond the control of the parties. *Force majeure* clauses must be certain to be effective and should include reference to specific events (e.g., natural disasters, acts of war, acts of terrorism and, most recently the covid-19 pandemic, which resulted in a wide range of *force majeure*-type claims).<sup>[43]</sup> Any ambiguity in a *force majeure* clause would be resolved against the party seeking to rely on that clause.<sup>[44]</sup> Wording equivalent to 'the usual *force majeure* clauses shall apply' are likely to be considered void,<sup>[45]</sup> and the courts have had some difficulty in upholding the validity of *force majeure* clauses that contain such catch-all language.<sup>[46]</sup> Each *force majeure* clause must be considered on its own terms and construed strictly.<sup>[47]</sup>

If the contract does not contain an express *force majeure* clause, parties may be able to rely on the common law principle of frustration, although this is very narrowly construed by the courts. 'Frustration' is the principle that a contract may be set aside if the performance of the contract becomes impossible, illegal or pointless by virtue of an unexpected event that is beyond the control of the contracting parties.<sup>[48]</sup> The courts have been slow to find that contracts have been frustrated and have made it clear that, for example, changes to market conditions that make the performance of the contract more onerous do not amount to frustration.<sup>[49]</sup>

## Promissory estoppel

If the courts consider that, despite the absence of consideration for a promise, it would be unjust to refuse to enforce the promise, the promisee can rely upon the equitable doctrine of promissory estoppel. There are three key elements to promissory estoppel:

1. a promise by one party that it will not enforce its strict legal rights against the other;
2. an intention on the promisor's part that the other will rely on that promise; and
3. actual detrimental reliance by the promisee on that promise.

The doctrine of promissory estoppel is available for use as 'a shield not a sword' and can only be used as a defence to an action brought by parties wishing to enforce their legal rights.<sup>[50]</sup>

## Illegality

An illegal contract is void and will not be enforced by the courts as a matter of public policy, in accordance with the courts' duty to uphold the law. As such, in contrast to other defences, courts may invoke a defence of illegality even when no party has raised it. Illegality was comprehensively evaluated in the UK Supreme Court decision in *Patel v. Mirza*.<sup>[51]</sup> Although a consensus was not reached, the majority of the UK Supreme Court deemed the key issue to be whether upholding the relevant contract would 'produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system'. This would entail considering the purpose of the transgressed provision and any relevant public policies that might be rendered ineffective or less effective by denying the claim, while keeping in mind the principle of proportionality.<sup>[52]</sup>

*Patel v. Mirza* was expressly adopted in Hong Kong in 2023. The applicable test in Hong Kong prior to 2023 was that a contract would not be void for illegality (i.e., the claimant could assert their legal or equitable interest) as long as the claimant did not have to plead or rely on these illegal acts to establish the basis of such an interest.<sup>[53]</sup> However, following the Court of Appeal judgment in *Monat Investment Ltd*,<sup>[54]</sup> the position was replaced by *Patel v. Mirza*, aligning the Hong Kong position to the United Kingdom at the appellate court level.

### Limitation and exclusion

Even if a contract is valid, a party may seek to avoid enforcement on other grounds. A complete defence is available if the claimant does not commence their claim within the relevant limitation period.<sup>[55]</sup> If a defendant raises this defence, the claimant has the burden of proving that the relevant limitation period has not expired. The limitation period for simple contract claims is six years, while claims pursuant to a contract under seal have a limitation period of 12 years. This limitation period commences from the date when the cause of action accrued.

Commercial parties are also likely to limit their potential liability under a contract when negotiating and drafting its terms. For example, parties may protect themselves by excluding liability in certain respects, imposing financial limits on liability, restricting terms implied into contracts by statute and alleviating the parties' obligations of performance if prevented by forces outside of their control. Hong Kong courts will generally uphold such provisions, as long as they are not prohibited by legislation<sup>[56]</sup> or common law principles such as illegality, subject to the caveat that more valuable rights can only be excluded with very clear and obvious language.<sup>[57]</sup>

### Duress and undue influence

A party who is induced into entering or varying a contract by threats or other illegitimate means may rely on duress or undue influence, and the contract will be voidable by that party. For instance, a party may be subject to physical duress (e.g., actual or threatened violence against the party or to its property) or economic duress (e.g., threats to terminate the contract).

## Fraud, misrepresentation and other claims

## Fraud and misrepresentation

In Hong Kong, fraud associated with breach of contract is claimed either as a claim in the tort of deceit or as fraudulent misrepresentation. The tort of deceit has five elements.<sup>[58]</sup>

1. there is a false representation of fact made by words or through conduct;
2. the representation is made with knowledge that it is or may be false. It must be willfully false or at least made in the absence of any genuine belief that it is true;
3. the representation is made with the intention that it should be acted upon by the claimant, or by a class of persons, including the claimant, in a manner that caused damage to the claimant;
4. the claimant acted upon the false statement; and
5. the claimant suffered damage by so doing.

If the tort of deceit is proved, the claimant is entitled to damages in tort (with no remoteness limitation) and to rescission of the contract.

Misrepresentation, however, is governed by the Misrepresentation Ordinance (Cap. 284) and common law. A misrepresentation claim requires the claimant to show:

1. a defendant's statement was false;
2. the claimant entered into the contract as a result of that statement; and
3. the claimant consequently suffered damage.

Under Hong Kong law, there are three types of misrepresentation: fraudulent, negligent and innocent misrepresentation. The distinction depends on the defendant's knowledge or state of mind, or both, in relation to the false statement:

1. fraudulent misrepresentation – the claimant must show the defendant knew that the statement was false, did not believe the statement was true or was reckless as to the truth of the statement;<sup>[59]</sup>
2. negligent misrepresentation – under common law, the law imposes a duty of care when information is sought from or imparted by a party who possesses a special skill, is trusted to exercise due care and knew or ought reasonably to have known that the claimant relied on the defendant's skill or judgment.<sup>[60]</sup> The claimant must show that the defendant fell below the standard of reasonable care in making the false statement. For statutory claims, once the claimant proves the false statement, the burden shifts to the defendant to show that he or she had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true,<sup>[61]</sup> and
3. innocent misrepresentation – here, the defendant was neither fraudulent nor negligent in making the statement, yet the statement nevertheless induced the claimant to enter into the contract and thereby suffer loss.

For cases of fraudulent or negligent misrepresentation, a successful claimant may claim damages or rescission, or both, of the contract. For innocent misrepresentation, the court retains a discretion to award either rescission of the contract or damages in lieu of rescission, but not both.<sup>[62]</sup>

Neither party to a contract can attempt to exclude or restrict liability for misrepresentation unless it meets the requirement of reasonableness in Section 3 of the Control of Exemption Clauses Ordinance (Cap. 71).<sup>[63]</sup>

### Inducing a breach of contract

The economic tort of inducing a breach of contract involves the claimant suffering loss as a result of a party being knowingly induced to breach a contract by the defendant. A claim for inducing a breach of contract requires that the contract actually be breached; mere interference with the performance of a contract will not be enough. The only other element required is intention, usually shown by the defendant having knowledge of the existence of the contract and its specific terms.<sup>[64]</sup>

### Good faith

Historically, the courts have refrained from implying general obligations of good faith in commercial contracts on the basis that such an implied term would interfere with the certainty of the contract.<sup>[65]</sup> While English law has moved towards a more liberal view of implied terms of good faith,<sup>[66]</sup> Hong Kong courts have not followed that approach to date. The courts will resist attempts to rely on good faith obligations to override express contractual terms.<sup>[67]</sup>

Nevertheless, the courts are more likely to find an implied duty of good faith in certain types of contractual relationships, such as employer and employee contracts<sup>[68]</sup> or insurance contracts,<sup>[69]</sup> or where there is a clear information gap between the parties such that confidence and trust are essential for the contract to work.<sup>[70]</sup>

## Remedies

When a contract has been breached, various remedies may be available to the injured party.<sup>[71]</sup>

### Compensatory damages

The primary remedy for breach of contract is an award of monetary damages, which is generally awarded to compensate for the injured party's loss and put it in the position in which it would have been had the contract been properly performed.<sup>[72]</sup>

The burden of proof lies on the claimant to prove factual causation of its loss (i.e., it must prove that but for the breach, the loss would not have occurred). Accordingly, when the court assesses the extent of any loss, it will consider the claimant's position compared to the position in which it would have been but for the breach.

This analysis may account for profits that would otherwise have been earned, costs that would otherwise have been avoided and non-financial benefits that might have been received, while also acknowledging any benefits that otherwise would not have been received by the claimant.

## Limitations to recovery of damages

As discussed above, to bring a breach of contract claim, the non-breaching party must show that there is sufficient causation between the breach and the loss that they have suffered. If the chain of causation cannot sufficiently be demonstrated, that will impact the remedies available.

A key further restriction on the recovery of damages for breach of contract is remoteness.<sup>[73]</sup> Only losses that were 'within the reasonable contemplation of the parties' such that the breaching party 'assumed responsibility for the loss' are recoverable.<sup>[74]</sup>

The non-breaching party must also ensure that they have taken reasonable steps to mitigate their loss, and the court can (for negligence claims) apportion damages between the parties if they result partly from the claimant's own fault and partly from the fault of another person.<sup>[75]</sup>

## Other potential damages

In certain circumstances, damages may be awarded on grounds other than their general compensatory function. For example, restitutionary damages may be recoverable if the claimant has not suffered any loss but the defendant has derived a benefit from breaching the contract.

Separately, though in similar instances, a claimant may be able to recover 'negotiating damages' – the hypothetical sum that the defendant would have paid the claimant had the defendant negotiated a release of their obligations before breaching the contract.<sup>[76]</sup>

Punitive (or exemplary) damages, intended to penalise the defendant, are considered a 'remedy of last resort' for breach of contract.<sup>[77]</sup> In addition, a clause that specifies an amount to be paid for a breach of contract will not be enforceable if it amounts to a 'penalty'.<sup>[78]</sup>

## Indemnification

A party to a contract that includes indemnities may have an alternative remedy available for breach of contract, which may provide quicker and easier recovery than a contractual claim for damages. Under an indemnity, one party promises to compensate another party in respect of a specified liability.<sup>[79]</sup> The contract must be explicit about what liabilities may trigger the indemnity and the extent of any recovery available under it.

## Non-monetary remedies

In some cases, the courts have discretion to award non-monetary remedies when more appropriate. For example, an order for specific performance requires a party to perform their positive obligations under the relevant contract. For negative covenants, a prohibitory



injunction order (which is more common than a mandatory injunction in the context of contractual claims) would require the defendant to refrain from an act that they promised not to perform, such as a promise not to engage in employment with a competitor for a certain period. Although specific performance and injunctions may only be ordered when damages are inadequate as a remedy (save for freezing injunctions, known as a *Mareva* injunction after the English case of the same name),<sup>[80]</sup> the courts have demonstrated a willingness to take a broad approach to the requirement that damages must be an inadequate remedy.<sup>[81]</sup>

## Special considerations

Owing to historical reasons, the common law system continues to be practised in Hong Kong, as guaranteed by the Basic Law, the constitutional document of Hong Kong. Under the Basic Law, the laws previously in force in Hong Kong prior to its reunification on 1 July 1997, which include the common law and rules of equity, shall be maintained to the extent that they do not contravene the Basic Law and have not been amended by the Hong Kong legislature. UK Privy Council decisions on appeal from Hong Kong prior to 1 July 1997 continue to be binding in Hong Kong.<sup>[82]</sup> Although decisions of the House of Lords and the Privy Council (now the UK Supreme Court) delivered after 1 July 1997 are not binding, they are highly persuasive and Hong Kong courts do not generally depart from such decisions unless jurisdiction-specific considerations prevail.<sup>[83]</sup> In addition, under the Basic Law, Hong Kong courts are expressly permitted to refer to precedents of other common law jurisdictions.<sup>[84]</sup>

Following the reunification on 1 July 1997, the Court of Final Appeal in Hong Kong is now the highest court of Hong Kong. Article 82 of the Basic Law provides that the power of final adjudication of Hong Kong shall be vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the panel.

## Outlook and conclusions

The Hong Kong courts are one of the most sophisticated and well-regarded forums for resolving complex commercial disputes in the common law world, with well-established case law providing guidance for both general and niche issues (often referred to by courts in other common law jurisdictions), a well-structured court system catering for various types of disputes and size of claims, together with a strong body of legal professionals and judges trained domestically and overseas.

The technological shift adopted by the Hong Kong Judiciary, accelerated by the covid-19 pandemic, and in the recent enactment of the Court Proceedings (Electronic Technology) Ordinance (Cap. 638), as well as the Judiciary's iCMS system, are a welcome development that will provide a useful legal framework for more efficient allocation of court resources and streamlined public access to the court system. As the scale and complexity of technology used in court proceedings grow, there may be a need to review or expand existing Practice Directions and civil procedure rules to cater for the increasing technological demands of modern disputes.

The law in relation to the court's insolvency jurisdiction versus jurisdictional clauses may be revisited by the Hong Kong Courts in the near future in light of the recent Privy Council decision in *Sian Participation v. Halimeda*,<sup>[85]</sup> under which the Privy Council held that a generally worded arbitration agreement (or exclusive jurisdiction clause) will not automatically stay a winding-up petition unless it is shown that the petition debt is 'genuinely disputed on substantial grounds'. This resembles the traditional triable issue standard that was applied before *Re Guy Kwok-hung Lam*, *Re Simplicity* and *Re Shandong Chenming*. While the Privy Council decision is not binding in Hong Kong, it remains to be seen how it may affect the Hong Kong Court's approach in similar cases going forward.

Hong Kong law is a sensible and commercial choice of governing law. In particular, for parties entering into cross-border transactions, the new arrangement for the reciprocal enforcement of civil and commercial judgments in Hong Kong and mainland China under Cap. 645 is hoped to provide a smoother process for the resolution of cross-border disputes, particularly for creditors claiming against companies registered in Hong Kong but with key assets in mainland China, or vice versa. Judicial independence is also guaranteed under Article 85 of the Basic Law, which provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference, and members of the judiciary shall be immune from legal action in the performance of their judicial functions. Furthermore, as the only common law jurisdiction in China with a wealth of English-speaking judges and well-trained lawyers, Hong Kong is sure to remain a preferred venue for foreign parties to resolve their business disputes, both in the Hong Kong court system and increasingly via commercial arbitration.

## Endnotes

- 1 Hong Kong Judiciary, 'Implementation Notices', available at: [https://www.judiciary.hk/en/e\\_courts/Ann\\_IN.html](https://www.judiciary.hk/en/e_courts/Ann_IN.html). ^ [Back to section](#)
- 2 Hong Kong Judiciary, 'Use of electronic technology in e-Courts', available at: [https://www.judiciary.hk/en/e\\_courts/uoetie\\_index.html](https://www.judiciary.hk/en/e_courts/uoetie_index.html). ^ [Back to section](#)
- 3 Legislative Council of Hong Kong, 'Consultation Paper on Mandatory Use of the integrated Court Case Management System for Legal Representatives' (LC Paper No. CB(4)14/2024(01), available at: <https://www.legco.gov.hk/yr2024/english/panels/ajls/papers/ajlscb4-14-1-e.pdf> at [4] and [27]. ^ [Back to section](#)
- 4 Practice Direction 38 also came into effect on the same day to provide for the practice and procedures of the registration of Mainland judgments under Cap. 645 and its rules (Cap. 645A). ^ [Back to section](#)
- 5 Section 23 of Cap. 645. ^ [Back to section](#)
- 6 *Guy Kwok-hung Lam v. Tor Asia Credit Master Fund LP* [2023] HKCFA 9. ^ [Back to section](#)

- 7 *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299. [^ Back to section](#)
- 8 *Re Shandong Chenming Paper Holdings Limited* [2024] HKCA 352. [^ Back to section](#)
- 9 *Re Gatecoin Ltd (in liquidation)* [2023] HKCFI 914. [^ Back to section](#)
- 10 *MANTRA DAO Inc v. John Patrick Mullin and others* [2024] HKCFI 2099. [^ Back to section](#)
- 11 A counteroffer is also considered to be a rejection of the original offer: see *Hyde v. Wrench* (1840) 3 Beav 334, affirmed in *Lee Siu Fong Mary v. Ngai Yee Chai* [2006] 1 HKC 157. [^ Back to section](#)
- 12 Unless the contract is made by way of a deed, which requires certain execution requirements. [^ Back to section](#)
- 13 *Stilk v. Myrick* (1809) 2 Camp 317, affirmed in *Chong Cheng Lin Courtney v. Cathay Pacific Airways Limited* [2011] 1 HKLRD 10. [^ Back to section](#)
- 14 *Williams v. Roffey Bros & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5, applied in Hong Kong cases, including *UBC (Construction) Ltd v. Sung Foo Kee Ltd* [1993] 2 HKLR 207, [1993] 2 HKC 458 and *Chong Cheng Lin Courtney v. Cathay Pacific Airways Ltd* [2011] 1 HKLRD 10. [^ Back to section](#)
- 15 See, for example, *Wu Kit Man v. Dragonway Group Holdings Ltd* [2018] 2 HKLRD 117 and *Re Tse Sheung Yan*, HCB 62/2000 & 484/2000 (7 July 2000). [^ Back to section](#)
- 16 *Cheng Mei Ling v. Lam Siu Chor Sharen* [2020] HKCFI 2958. [^ Back to section](#)
- 17 *Barbudev v. Eurocom Cable Management Bulgaria EOOD and Others* [2012] EWCA Civ 548, affirmed in *Bonds Group Co Ltd v. Kwan Daniel* [2023] HKCA 1365. [^ Back to section](#)
- 18 *Bonds Group Co Ltd v. Kwan Daniel* [2023] HKCA 1365. [^ Back to section](#)
- 19 Section 4(2), Contracts (Rights of Third Parties) Ordinance (Cap. 623). [^ Back to section](#)
- 20 Section 4(1)(a)-(b), Contracts (Rights of Third Parties) Ordinance (Cap. 623). [^ Back to section](#)
- 21 *Eminent Investments (Asia Pacific) Ltd v. Dio Corporation* [2020] HKCFA 38. [^ Back to section](#)
- 22 *Eminent Investments (Asia Pacific) Ltd v. Dio Corporation* [2020] HKCFA 38 at [43], affirming Ma CJ's judgment in *Fully Profit (Asia) Ltd v. Secretary for Justice* (2013) 16 HKCFAR 351. [^ Back to section](#)

- 23** The leading authority of *Jumbo King Ltd v. Faithful Properties Ltd & Ors* (1999) 2 HKCFAR 279 states that interpretation of a contract involves 'having regard...to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve'. [^ Back to section](#)
- 24** For example, *HZ Capital International Ltd v. China Vocational Education Co Ltd and Others* [2019] HKCFI 2705 in the context of arbitration clauses where guidance was approved to the effect that 'the courts should not be astute to find uncertainty'. [^ Back to section](#)
- 25** However, *contra proferentem* has no application if the natural and ordinary meaning of the exemption clauses leaves no room for reasonable ambiguity: *Bewise Motors Co Ltd v. Hoi Kong Container Services Ltd* (1997-1998) 1 HKCFAR 256; *Tam Wing Chuen and Skai Import-Export Ltd v. Bank of Credit & Commerce Hong Kong Ltd (in liquidation)* [1996] 1 HKC 692. [^ Back to section](#)
- 26** *BP Refinery (Westernpoint) Pty Ltd v. Shire of Hastings (Victoria)* [1977] UKPC 13 (27 July 1977), adopted in *Kensland Realty Ltd v. Whale View Investment Ltd and Tam, Pun & Yipp (a firm)* (2001) 4 HKCFAR 381; [2002] 1 HKLRD 87, which has been identified as the 'leading authority' in Hong Kong in relation to implied terms in fact: *Lau Chun Ming v. Deloitte Touche Tohmatsu (a firm)* [2019] HKCFI 2722 (affirmed on appeal: [2021] 2 HKLRD 706). [^ Back to section](#)
- 27** See *MG Charter Limited v. Beijing Caissa International Travel Service Co Ltd* [2019] HKCFI 2800 for an example of how this test was applied. [^ Back to section](#)
- 28** *Liverpool City Council v. Irwin* [1977] AC 239, affirmed in *The Commissioner of Inland Revenue v. Emerson Radio Corporation and Emerson Radio Corporation v. The Commissioner of Inland Revenue* (1999) 2 HKCFAR 501, [2000] 1 HKLRD 238; *Gain Sky Limited v. Chau Tak Hing and Leung Yin Bing Dorothy*, HCA 917/2004 (23 December 2005). [^ Back to section](#)
- 29** The jurisdiction of courts in Hong Kong is outlined in Sections 12 and 13 of the High Court Ordinance (Cap. 4) for the Court of First Instance and Court of Appeal respectively, and Section 4 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484). Other courts in Hong Kong include the District Court, the magistrates' courts, the Coroner's Court as well as a number of specialised tribunals to adjudicate on specific matters. [^ Back to section](#)
- 30** See Order 12, Rule 8 of the Rules of the High Court (Cap. 4A) and Rules of the District Court (Cap. 336H). [^ Back to section](#)

- 31** An exclusive jurisdiction clause will be upheld even if it extends to staying a bankruptcy petition where the underlying dispute of the petition debt is subject to an exclusive jurisdiction clause, absent strong countervailing factors such as the interest of other creditors: *Re Guy Kwok-Hung Lam* [2023] HKCFA 9. Furthermore, third parties are typically bound by exclusive jurisdiction clauses, unless a contrary intention is expressed: see Section 13 of the Contracts (Rights of Third Parties Ordinance) (Cap. 623). See also Section 17 of the Control of Exemption Clauses Ordinance (Cap. 71) on specific restrictions imposed for jurisdiction clauses. [^ Back to section](#)
- 32** However, see *Noble Power Investments Ltd & Anor v. Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631 where the Court of Appeal admitted that there is 'no difference in principle between an exclusive jurisdiction clause and a non-exclusive jurisdiction clause to the extent that in both situations, the parties have agreed, if they are sued in the named forum, to submit to it'. In any case, if proceedings have been instituted in a forum named in the non-exclusive jurisdiction clause, the party who seeks a stay or otherwise to contest the jurisdiction or appropriateness of that forum has a 'very heavy burden to discharge'. [^ Back to section](#)
- 33** For example, *Industrial and Commercial Bank of China (Asia) Ltd v. Wisdom Top International Ltd* [2020] HKCFI 322. When interpreting a jurisdiction clause, the English courts will start from the assumption that commercial parties, as rational business people, are likely to have intended any and all disputes arising out of the relationship into which they have entered to be decided by a single tribunal or court: see *Fiona Trust and Holding Corporation and another v. Privalov and Others* [2007] UKHL 40, cited with approval in *C v. D* [2022] HKCA 729. [^ Back to section](#)
- 34** For example, in the case of arbitration clauses, in *AT & JM Group Ltd v. Li & Fung (Trading) Ltd*, HCA 780/2010 (22 September 2010), a simple 'please refer to purchase order terms & conditions' was not sufficient to incorporate the arbitration clause (which was part of the terms and conditions) into the relevant contract, where there was no express arbitration clause on the face of the contract itself. However, see *HZ Capital International Ltd v. China Vocational Education Co Ltd and Others* [2019] HKCFI 2705 where guidance was approved to the effect that in the interests of public policy, courts should lean towards enforcement of prescribed ADR provisions, instead of being quick to void them for uncertainty. See also *Hyundai Engineering and Construction Co Ltd v. Vigour Ltd* [2004] HKCFI 205 (appeal dismissed: [2005] 3 HKLRD 723). [^ Back to section](#)
- 35** See Paragraph 1 of Practice Direction 31. See also the decision in *Re Simplicity & Vogue Retailing (HK) Ltd* [2024] HKCA 299 where the Court of Appeal stated that, if the petition debt is subject to an arbitration agreement, the court retained flexibility in exercising its discretion to either order a winding-up order or hold parties to the arbitration agreement as the circumstances require. This extends the approach adopted in *Re Guy Kwok-Hung Lam* [2023] HKCFA 9 where the petition debt was subject to an exclusive jurisdiction clause instead. [^ Back to section](#)
- 36** See Paragraph 4 of Practice Direction 31. [^ Back to section](#)

- 37** See Paragraph 5(1)-(2) of Practice Direction 31. [^ Back to section](#)
- 38** Settlement negotiations typically take place either on a 'without prejudice' basis (meaning that the court cannot be informed of the content of those negotiations at all) or 'without prejudice, save as to costs' (meaning that the court cannot be informed of the content of those negotiations until after substantive determination of the dispute, and then only for the purposes of deciding the appropriate order in respect of the costs of the court proceedings). [^ Back to section](#)
- 39** The most common example of a repudiatory breach is a breach of condition (although a fundamental breach of an innominate term may also be a repudiatory breach) that allows the non-breaching party to terminate the contract and claim damages, regardless of the consequences of the breach. Breaches of warranties do not terminate contracts, and the correct remedy in that situation is a claim for damages. [^ Back to section](#)
- 40** *Heyman v. Darwins Ltd* [1942] AC 356, cited with approval in *Kensland Realty Limited v. Whale View Investment Limited and Tam, Pun & Yipp (a firm)* (2001) 4 HKCFAR 381; [2002] 1 HKLRD 87. [^ Back to section](#)
- 41** *Lam Tam Luen v. Asia Television Ltd* [2008] 5 HKLRD 5 (CACV 134/2007); *Yinggao Resources Ltd v. Hongkong and Shanghai Banking Corp Ltd* [2022] HKCFI 3597 (not disturbed on appeal: [2022] HKCA 1477). [^ Back to section](#)
- 42** If a contract is rendered 'void', it is immediately ineffective; if a contract is merely 'voidable', it will remain valid and effective unless and until it is rescinded. [^ Back to section](#)
- 43** For example, *Holdwin Ltd v. Prince Jewellery and Watch Co Ltd (formerly known as Success Light Investments Ltd)* [2021] HKCFI 2735 where, upon a strict reading of the relevant clause, the Court of First Instance refused to find that covid-19 fell within the scope of the words used. [^ Back to section](#)
- 44** *Goldlion Properties Ltd v. Regent National Enterprises Ltd* (2009) 12 HKCFAR 512. [^ Back to section](#)
- 45** *British Electrical and Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd* [1953] 1 WLR 280. [^ Back to section](#)
- 46** *Sun Wah Oil & Cereals Ltd v. Gee Tai Trading Co Ltd* [1994] 1 HKLR 50. [^ Back to section](#)
- 47** *Goldlion Properties Ltd v. Regent National Enterprises Ltd* (2009) 12 HKCFAR 512; *Great Pacific Investments Ltd v. Zhang Huarong* [2023] HKCFI 1539. [^ Back to section](#)
- 48** See Section 16-18 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), which sets out how benefits obtained or expenses incurred before the frustrating event will be handled in the event of frustration. [^ Back to section](#)

- 49** *Davis Contractors Ltd v. Fareham Urban District Council* [1956] UKHL 3. It was held in recent cases that neither the social unrest in Hong Kong in 2019 nor the covid-19 pandemic constituted valid grounds for frustration of tenancy agreements: *The Centre (76) Ltd v. Victory Serviced Office (HK) Ltd* [2020] HKCFI 2881; *Sunbroad Holdings Ltd v. A80 Paris HK Ltd* [2021] HKCFI 1422; *Wharf Realty Limited v. Abebi Limited trading as 'Armani Junior', AGB Legend Limited trading as 'Abebi'*, HCA 954 & 955/2020 [2022] HKCFI 2036. ^ [Back to section](#)
- 50** *Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd (No.3)* [1955] 1 WLR 761; *Liao Zhiqiang and Others v. China Northern Newenergy Investment Ltd and Others* [2022] HKCFI 892. ^ [Back to section](#)
- 51** *Patel v. Mirza* [2016] UKSC 42. ^ [Back to section](#)
- 52** *Patel v. Mirza* [2016] UKSC 42 at [101], cited in *Monat Investment Ltd v. All person(s) in Occupation of Part of the Remaining Portion of Lot No. 591 in Mui Wo DD 4 No. 16 Ma Po Tsuen, Mui Wo, Lantau Island & Anor* [2023] HKCA 479. ^ [Back to section](#)
- 53** *Tinsley v. Milligan* [1994] 1 AC 340. ^ [Back to section](#)
- 54** *Monat Investment Ltd v. All person(s) in Occupation of Part of the Remaining Portion of Lot No. 591 in Mui Wo DD 4 No. 16 Ma Po Tsuen, Mui Wo Lantau Island & Anor* [2023] HKCA 479. ^ [Back to section](#)
- 55** See, in this regard, the Limitation Ordinance (Cap. 347). ^ [Back to section](#)
- 56** In particular, the Control of Exemption Clauses Ordinance (Cap. 71) and the Sale of Goods Ordinance (Cap. 26). ^ [Back to section](#)
- 57** For example, *Carewins Development (China) Ltd v. Bright Fortune Shipping Ltd & Anor* [2009] 5 HKC 160; (2009) 12 HKCFAR 185, where the exemption clause was not found to cover deliberate contractual breaches. ^ [Back to section](#)
- 58** *Haifa International Finance Co Limited v. Concord Strategic Investments Limited* [2009] 4 HKLRD 29. ^ [Back to section](#)
- 59** *Derry v. Peek* (1889) 14 App Cas 337, applied in *Lee Yuk Shing v. Dianoor International Limited (in liquidation)*, CACV 185/2015 (23 May 2016). ^ [Back to section](#)
- 60** *Hedley Byrne & Company Limited v. Heller* [1964] AC 465, applied in *Yinggao Resources Ltd v. Eco Metal (Hong Kong) Limited*, HCA 964/2012 (16 July 2013) (not disturbed on appeal: CACV 219 & 223/2013). ^ [Back to section](#)
- 61** Under Section 3(1), Misrepresentation Ordinance (Cap. 284). ^ [Back to section](#)
- 62** Section 3(2), Misrepresentation Ordinance (Cap. 284). ^ [Back to section](#)

- 63** Section 4, Misrepresentation Ordinance (Cap. 284). [^ Back to section](#)
- 64** *OBG Ltd v. Allan* [2008] 1 AC 1, affirmed in *Xiamen Xinjingdi Group v. Eton Properties Ltd* [2016] 2 HKLRD 1106. [^ Back to section](#)
- 65** *Walford v. Miles* [1992] 2 AC 128; *Hyundai Engineering & Construction Co Ltd v. Vigour Ltd* [2005] 3 HKLRD 723. [^ Back to section](#)
- 66** *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB). [^ Back to section](#)
- 67** See above on the general principles applicable to implication of contractual terms. [^ Back to section](#)
- 68** *Tadjudin Sunny v. Bank of America*, CACV 12/2015 (20 May 2016). [^ Back to section](#)
- 69** *Re Shing Pui Keung Ex-p Chubb Life Insurance Co Ltd*, HCB 686/2017 (20 December 2017). [^ Back to section](#)
- 70** *Hong Jing Company Limited v. Zhuhai Kwok Yuen Investment Company Limited*, CACV 63/2011 and CACV 254/2011 (17 July 2012). [^ Back to section](#)
- 71** It is also possible to agree remedies for breach of contract, including by way of deposit mechanisms, actions for agreed sums and liquidated damages. Agreed remedies are subject to the rule against penalties, discussed below. [^ Back to section](#)
- 72** *Robinson v. Harman* (1848) 1 Ex 850, cited with approval in *Keep Point Development Ltd v. Chan Chi Yim and Others* [2003] 2 HKLRD 207, (2003) 6 HKCFAR 160. [^ Back to section](#)
- 73** See *Hadley v. Baxendale* (1854) 9 Ex Ch 341, *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528, *Koufos v. C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350, all cited with approval in *Paul Chen v. Lord Energy Ltd* [2002] 1 HKLRD 495, (2002) 5 HKCFAR 297. [^ Back to section](#)
- 74** *Richly Bright International Ltd v. De Monsa Investments Ltd* (2015) 18 HKCFAR 232, which restated the test on remoteness of damages for contractual breach from *Paul Chen v. Lord Energy Ltd* [2002] 1 HKLRD 495, (2002) 5 HKCFAR 297. [^ Back to section](#)
- 75** Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), Section 21. [^ Back to section](#)
- 76** This principle was first established in *Wrotham Park Estate Ltd v. Parkside Homes Ltd* [1974] 1 WLR 798, applied in Hong Kong cases, including *Wing Ming Garment Factory Limited v. The Incorporated Owners of Wing Ming Industrial Centre* [2014] 4 HKLRD 52. [^ Back to section](#)



- 77** *William Allan v. Messrs. Ng & Co (a firm) and Christopher Erving* [2012] 2 HKLRD 160. [^ Back to section](#)
- 78** In *Cavendish Square Holding BV v. Talal El Makdessi and ParkingEye Ltd v. Beavis* [2015] UKSC 67 (adopted in the Hong Kong Court of Appeal case of *Law Ting Pong Secondary School v. Chen Wai Wah* [2021] HKCA 873), the UK Supreme Court defined a penalty clause as 'a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'. [^ Back to section](#)
- 79** For example, if a company is acquired through a share purchase, the buyer will frequently require indemnities from the seller against any tax liabilities of the target, as well as other relevant risks (such as shortfalls in the target's pension scheme). [^ Back to section](#)
- 80** *Beswick v. Beswick* [1968] AC 58; *Compania Sud Americana de Vapores SA v. Hin-Pro International Logistics Limited (in Receivership)* [2015] 2 HKLRD 458. [^ Back to section](#)
- 81** For example, *Pacific Harbor Advisors Pte Ltd and Another v. Winson Federal Ltd and Others*, HCA 1257/2013 (19 November 2015) at [55]-[62]. In addition to a growing tendency by the courts not to treat the adequacy of damages as a necessary threshold, but to ask the question of whether it would be more just to grant specific performance than to award damages, factors such as problems in assessing the value of shares and a risk that the defendant will be unable to satisfy an order for damages are sufficient to justify the conclusion that damages would not be an adequate remedy. [^ Back to section](#)
- 82** See Articles 8 and 18(1) of the Basic Law of the Hong Kong Special Administrative Region, and *A Solicitor (24/07) v. Law Society of Hong Kong* (2008) 11 HKCFAR 117. [^ Back to section](#)
- 83** *A Solicitor (24/07) v. Law Society of Hong Kong* (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576. [^ Back to section](#)
- 84** Article 84 of the Basic Law of the Hong Kong Special Administrative Region. [^ Back to section](#)
- 85** *Sian Participation Corp (in liquidation) v. Halimeda International Ltd* [2024] UKPC 16. [^ Back to section](#)

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