Chapter One
Contract

This chapter is concerned with the law that governs an agreement between parties. In particular, this chapter intends to review the common law principles relating to contracts. Consequently, less emphasis is placed on contracts regulated by legislation as to form or as to content. Likewise, little emphasis is placed on contracts which are highly specialized, such as an agreement which involves matters concerning employment which are generally categorized as employment law.

The Contract chapter is organized into three general sections. The first section provides the definition of the term "contract" in general and reviews the different types of contract. The next section presents an analysis concerning the creation of a contract and its legal application to the parties. The third and final section assesses the manners in which a contract may be terminated.

I. DEFINITION

A contract is a legally binding agreement between the parties to that agreement. The term "contract" has been described as referring to one or more of the following situations:

- a series of promises or acts that constitute a legally binding agreement, *e.g.*, a promise or a set of promises which the law will enforce;
- the legal relationship that results from a series of promises or acts; or,
- the document which embodies that series of promises or acts or the performance of that series of promises or acts.[1]

1. 7(2) Halsbury's Laws of Hong Kong para. 115.002 (2007) (citations omitted) [hereinafter 7(2) Halsbury's].

Contract law is concerned with the validity and enforceability of that agreement.[2] The law of contract consists of case law which serves as precedent and which applies generally to all types of contracts. Unlike tort law, one's liability under contract law depends on promises the parties have made to each other. Through their agreement, the parties make legally binding arrangements which will govern their relationship. Enforcement of a contract is effected through the law and the courts.

The basis of contract law can also be seen as reliance: to rely on receiving some future benefits as part of an agreed exchange and to reduce uncertainties associated with the exchange. One purpose of contract law is to provide a structure within which parties can organize their relationships, particularly commercial ones, with a high degree of certainty.[3] Thus, a contract can be seen as an allocation of risk between the parties, that is, an agreement determining which party will bear the risk of any loss in the transaction.[4] For example, the parties may agree that a seller in Hong Kong will bear the risk of loss of a shipment of goods until it is delivered to the buyer's warehouse in the United States.

II. TYPES

As mentioned above, a contract is a legally binding agreement. Some of the reasons for creating a contract have been discussed. In this section, some of the various types of legally binding agreements are presented, although some of these agreements may fall into more than one category.[5]

2. For an exhaustive discussion of the dichotomy of these two definitions of the term "contract", see, *e.g.*, 1 CHITTY ON CONTRACTS para. 1–001 (H.G. BEALE, *et al.* eds., 30th ed. 2008) [hereinafter CHITTY].
   The Hong Kong government's Bilingual Laws Information System's *The English-Chinese Glossary of Legal Terms* [hereinafter *BLIS Glossary*] translates "legal contracts" as 合法合同 and "legally binding" as 具法律約束力. See the *BLIS Glossary* website at: *http://www.legislation.gov.hk/eng/glossary/homeglos.htm* (last visited 1 Feb. 2011).
3. CAROLE CHUI & DEREK ROEBUCK, HONG KONG CONTRACTS para. 1.3 (2nd ed. 1991) [herein after CHUI & ROEBUCK].
   See also STEPHEN HALL, LAW OF CONTRACT IN HONG KONG: CASES AND COMMENTARY 2–7 (revised 2nd ed. 2009) [hereinafter HALL].
4. CHUI & ROEBUCK, *supra* note 3, at paras. 1.3; 2.1.
5. *See* 7(2) HALSBURY'S, *supra* note 1, at paras. 115.011–115.012. The Property chapter of this work will discuss contracts which must be in writing or which must be evidenced by writing.

A. Generally

A legally binding agreement may have many different forms and may have several classifications.[6] Thus, a contract may be a completely oral agreement; a completely written agreement; or, a partly oral and partly written agreement. As their classifications imply, oral contracts are legally binding verbal agreements; written contracts are legally binding agreements in writing.

Another classification places agreements which are enforceable legally into three different categories: contracts of record; simple contracts; and, contracts made by deed.[7] "Contracts of record" are not contracts in the sense in which that term is usually used but are judgments and recognizances[8] enrolled in the record of a court and in law imply an obligation arising from the entry on the record and not from any agreement between the parties.[9]

"Simple contracts" are contracts without a seal and thus require consideration. Simple contracts are all contracts other than contracts of record or contracts under seal.

> Simple contracts may be express or implied, or partly express and partly implied. Contracts are express to the extent that their terms are set out distinctly either by word of mouth or in writing. They are implied to the extent, if any, to which their terms are a necessary inference from the words or conduct of the parties.[10]

Another form of contract is known as a "contract under seal", sometimes referred to as a "contract made by deed", a "deed", or a "specialty contract".[11]

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6. CHITTY, *supra* note 2, at para. 1–067 notes that contracts:

   > may be classified in a variety of ways: according to their subject-matter; according to their parties; according to their form (whether contained in deeds or in writing, whether express or implied) or according to their effect (whether bilateral or unilateral, whether valid, void, voidable or unenforceable). (citations omitted)

   This work is not intended to examine these categories in such depth; only the more common types or categories of contract will be introduced. For a detailed discussion of the myriad of contract types, *see, e.g., id.* at paras. 1–068 to 1–084.

7. 7(2) HALSBURY'S, *supra* note 1, at para. 115.010.
   The *BLIS Glossary*, *supra* note 2, translates "deed" as 契據.

8. The *BLIS Glossary*, *supra* note 2, translates "recognizance" as 擔保.

9. 7(2) HALSBURY'S, *supra* note 1, at para. 115.010.

10. *Id.* at para. 115.013 (citations omitted).

11. *See* the discussion of this topic in sections II.C and III.C and the accompanying footnotes. *See also* 7(2) HALSBURY'S, *supra* note 1, at para. 115.011.

A specialty contract must be signed, sealed, and delivered.[12] A specialty contract requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually presenting the document to the other party or by stating an intention that the deed be operative even though the deed is retained in the possession of the party that signed the deed.[13] In Hong Kong, contracts under seal are found mainly in real property transactions, government construction contracts and certain insurance contracts. One purpose of a deed is set out as follows:

> The basis of the common law of contract is bargain. A party who wants to enforce a contract must show that he or she has given consideration. If A says to B "On your twenty-first birthday, I will give you $100,000 to set you up in life" and B says "Thank you. …", there is certainly an agreement between them. But there is no contract … because B has not given anything in return for A's promise. Each party to a contract must

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The *BLIS Glossary*, *supra* note 2, translates "specialty" as 蓋印文據.

"A deed is a document which takes its effect from its formal nature." Chui & Roebuck, *supra* note 3, at para. 11.1.

> At common law, contracts under seal or specialties, were an important example of deeds and at common law a deed was an instrument which was not merely in writing, but which was sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability was incurred. In no other way than by the use of this form could validity be given … At common law, all deeds were documents under seal, but not all documents under seal were and are deeds. A deed must either:
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> (a) effect the transference of an interest, right or property;
> (b) create an obligation binding on some person or persons;
> (c) confirm some act whereby an interest, right or property has already passed.

Chitty, *supra* note 2, at para. 1–085.

12. Black's Law Dictionary 1350 (7th ed. 1999) [hereinafter Black's Law Dictionary] defines "seal" to be an "impression or sign that has legal consequence when applied to an instrument".

13. One authority expounds upon this requirement of delivery:

> "Where a contract is to be by deed, there must be a delivery to perfect it." "Delivered", however, in this connection does not mean "handed over" to the other party. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Any act of the party which shows that he intended to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party …

Chitty, *supra* note 2, at para. 1–093 (citations omitted).
See also Betty M. Ho, Hong Kong Contract Law 77–79 (2nd ed. 1994) (citation omitted) [hereinafter Ho].

> give something (which may be a promise) to the other in exchange for what he or she gets. It is not a contract if one party takes rights without incurring corresponding duties. But consideration is not necessary if the contract is by deed.
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> ...
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> Moreover, it is possible to make a gift ... which will be binding without consideration. It is the promise which is not binding without consideration, not the transfer of property. ... if the subject matter is of such a nature that delivery is not possible, such as a promise, then a deed must be used.[14]

Contracts under seal will be discussed further in section II.C.

Another form of contract is referred to as a "unilateral contract". This is a contract where one party makes a promise or several promises in return for an act, as opposed to a promise, of another party. For example, where a person makes an offer of a reward for the return of a lost item, the person making the offer (known as the "offeror") will be the only one bound by the offer. No one is obligated to conduct a search for the lost item. However, if upon learning of the offer, someone recovers and returns the lost item, that individual is entitled to the reward.[15] In this type of contract, the offeror makes a promise while the person receiving the offer (known as the "offeree") is expected to perform an act rather than to make one promise in return. Therefore, this is a:

> contract under which only one party undertakes an obligation. ... It is to be noted, though, that the unilateral nature of the contract does not ... mean that there is only one party, nor that there is no need for an acceptance of the provision of consideration by the other party. An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree's acceptance of the offer and the furnishing of consideration for the creation of the contract. Bilateral contracts comprise the exchange of a promise for a promise, e.g. if you promise to pay me £1,000, I promise to sell you my car.[16]

14. CHUI & ROEBUCK, *supra* note 3, at para. 2.2.
15. 7(2) HALSBURY'S, *supra* note 1, at para. 115.048 explains that the mode of acceptance in a unilateral contract is the performance of his side of the contract by the offeree. The real distinction between bilateral and unilateral contracts lies not in the nature of the act of acceptance, but in whether there is a contract before performance of that act. In a bilateral contract there will be an executory promise by the offeree; in a unilateral contract the promise will be executed the moment it is made.
16. CHITTY, *supra* note 2, at para. 1–079.

One commonly cited example of a unilateral contract is the case of *Carlill v Carbolic Smoke Ball Co*, which is discussed in section III.B.ii.c.

Another type of legally binding agreement is referred to as a "collateral contract".[17] This type of contract may arise in the course of negotiation of a main contract. A collateral contract is a subsidiary agreement which stands alongside the main contract, in which a party is promised something as an inducement to enter into the main contract.[18] Thus, a collateral contract arises out of, or from, another legally binding agreement, the main contract, and is related to that contract.[19]

A collateral contract takes the form of a unilateral contract, under which one party offers that if the second party enters into the main contract, the first party will promise something else to the second party. The consideration for the promise is the making of the main contract.[20] In *City & Westminster Properties v Mudd* [1958] 2 All ER 733, the tenant had been sleeping in the shop which he rented. During lease renewal negotiations, the landlord attempted to include a clause stating that the premises should not be used for lodging, dwelling or sleeping. The tenant objected, but was verbally informed that if he signed the lease, he could continue living in the basement. The landlord then attempted to rely on the contract clause to terminate the lease, claiming that the tenant breached the lease agreement by sleeping in the premises.[21] The court held that the tenant established that the oral promise made to him was part of a collateral contract. Because of the oral promise and in reliance upon it, the tenant had signed the main contract with the landlord.

17. "The word collateral in this context simply indicates a contract which exists alongside a main contract. For instance, a contract of guarantee cannot exist without something to guarantee." CHUI & ROEBUCK, *supra* note 3, at para. 4.8.
See also MICHAEL J. FISHER & DESMOND G. GREENWOOD, CONTRACT LAW IN HONG KONG 166–167 (2nd ed. 2011) [hereinafter FISHER & GREENWOOD].
18. CHUI & ROEBUCK, *supra* note 3, at para. 9.2.6.
19. *See* 7(2) HALSBURY'S, *supra* note 1, at para. 115.133 which explains a collateral contract thus:

> A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C. Before B can succeed in an action against C for breach of C's promise, B must prove the following: (1) that C made a promise to B *animo contrahendi* [with the intent of a contracting party]; (2) in reliance on that promise, B entered into the contract with A or did the other requested act. (citations omitted)

20. RICHARD STONE, THE MODERN LAW OF CONTRACT 206–207 (8th ed. 2009) [hereinafter STONE].
21. *Id.* at 251.

B. Third Party Contracts and Privity

As discussed below in the section on Consideration, the benefit or the obligation of a contract may be directed to a third party, that is, someone not a party to the contract. A situation such as this might raise enforcement difficulties due to the principle of privity of contract. "Privity" refers to being a party to a contract.

> The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.[22]

Thus, the general rule is that no one can sue or be sued on a contract to which that person is not a party. In other words, the provisions of a contract are only applicable to the parties to that contract.

As privity of contract dictates that only a party to a contract can sue or be sued on that contract, this doctrine will not allow a third party, i.e., in other words, a party not involved in the legally binding contractual relationship, to sue either party to the contract. A commonly used example to demonstrate this doctrine assumes that Alan owes a debt to Bob. Alan enters into a valid contract with Calvin to pay Bob. Calvin fails to pay Bob. Under the principle of privity of contract, Bob cannot sue Calvin. Rather, Bob would need to sue Alan who would then sue Calvin.[23]

Much has been written about the purpose and application of this principle along with the recourse available to parties such as Bob. Conceptually, the privity doctrine has engendered some debate amongst legal writers.[24] This theoretical debate has carried over to the courts which have created ways to circumvent this doctrine, such as the notion of an agent, a trust, and, the application of certain land covenants. Legislation has also been

22. CHITTY, *supra* note 2, at para. 18–003. *Id.* at para. 18–021 states further:

> The common law doctrine of privity means … that a person cannot acquire rights, or be subjected to liabilities, *arising under* a contract to which he is not a party. For example, it means that, if A promises B to pay a sum of money to C, then C cannot sue A for that sum. Similarly, if a contract between A and B contains a term purporting to exempt C from tortious liability to A, the doctrine of privity may prevent C from relying on that term in an action in tort brought against him by A. [emphasis in original]

23. FISHER & GREENWOOD, *supra* note 17, at 432–433, 446.
For a full discussion of this topic, *see, e.g., id.* at Chapter 16 ("Privity of Contract"); CHITTY, *supra* note 2, at Chapter 18 ("Third Parties").

24. FISHER & GREENWOOD, *supra* note 17, at 431–433.

enacted in order to limit the application of the privity doctrine. For example, in the United Kingdom there is the *Contracts (Rights of Third Parties) Act* 1999. In Hong Kong there is the *Married Persons Status Ordinance* (Cap 182). Additionally, in Hong Kong, the Law Reform Commission has issued a Consultation Paper[25] in 2004 and a Report on Privity of Contract[26] in 2005 suggesting that Hong Kong consider similar legislation to that found in the UK although to date no action has been taken by the legislature.

C. Formalities/Contracts Required to be in Writing

The most common forms or types of contracts have been discussed above. However, there are other types which, although perhaps not as common as the types of legally binding agreements above, should be mentioned. For these contracts, certain formalities need to be followed as to form or content, a requirement to be in writing or in the execution.

One type of contract requiring particular formalities has been introduced earlier: a contract under seal, also known as a contract made by deed, deed or specialty contract.[27] This type of legally binding agreement takes effect through its solemn form rather than through general contract principles. Therefore, a specialty contract must be signed, sealed, and delivered.[28] One reason for requiring this form is that a contract made by deed requires no consideration and has the seal of the signer attached. A contract under seal must be in writing and is conclusive between the parties when signed, sealed and delivered. Delivery is made either by actually handing the document to the other party or by stating an intention that the deed be operative even though the deed is kept in the possession of the party signing this document.

25. The Consultation Paper may be found at the following two web sites: *http://www.hkreform.gov.hk* (last visited 1 Feb. 2011) or *http://www.hklii.hk/eng/hk/other/hklrc/cp/2004/2.html* (last visited 1 Feb. 2011). *See* FISHER & GREENWOOD, *supra* note 17, at 444–449 for a review of the Consultation Paper.
26. The Report may be found at the following two web sites: *http://www.hkreform.gov.hk* (last visited 1 Feb. 2011) or *http://www.hklii.hk/eng/hk/other/hklrc/reports/2005/3.html* (last visited 1 Feb. 2011).
27. *See* the discussion of this topic on "Consideration" in section III.C and the accompanying footnotes. *See also* 7(2) HALSBURY'S, *supra* note 1, at para. 115.011.
28. "Delivered" is defined in CHITTY, *supra* note 2, at para. 1–093. *See supra* note 13; HALL, *supra* note 3, at 21. For example, the *Conveyancing and Property Ordinance* (Cap 219) sections 19 and 20, respectively, provide the legal requirements for executing a deed by an individual or by a corporation.

Earlier, a deed was explained as being a legally enforceable agreement without consideration. A contract under seal may also be used where there is consideration.

> This has traditionally been done in relation to complex contracts in the engineering and construction industries. This is probably because, by virtue [of the law], the period within which an action for breach of an obligation contained in a deed is 12 years, whereas for a "simple" contract it is only six years. The longer period is clearly an advantage in a contract where problems may not become apparent for a number of years.[29]

Another category pertains to contracts which must observe some kind of formality (usually that the agreement be written or be written in a particular way) in order to be valid. Thus, for the purposes of this section, these are referred to as "contracts required to be in writing". These are contracts which are required by law either to be in writing or to be evidenced in writing, *i.e.*, something in writing which proves the existence of the agreement. One of the most common contracts required to be in writing is a legally binding agreement that affects land, *e.g.*, purchase and sale agreements, certain leases, easements and mortgages.[30]

Examples of contracts which require both a particular formality and a particular content can be found in situations involving a power of attorney (a document which gives one person the right to act on another individual's behalf) or the employment of an apprentice. The *Powers of Attorney Ordinance* (Cap 31) requires that, under certain circumstances, a written document, such as the form set out in the Schedule, be signed and sealed in the presence of two attesting witnesses.[31] The *Apprenticeship Ordinance* (Cap 47) requires a contract of apprenticeship to be in writing and in a particular form.[32]

Other Hong Kong ordinances which require a legally binding agreement to be in writing or evidenced in writing include the following examples:

- *Arbitration Ordinance* (Cap 609);
- *Bills of Exchange Ordinance* (Cap 19);
- *Companies Ordinance* (Cap 32);
- *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78);

29. STONE, *supra* note 20, at 109. This subject is discussed in terms of the *Limitation Ordinance* (Cap 347) in section VIII.D.
30. *Conveyancing and Property Ordinance*, *supra* note 28, at section 4(2).
31. *Powers of Attorney Ordinance*, at section 2(2).
32. *Apprenticeship Ordinance* (Cap 47) section 8.

- *Marine Insurance Ordinance* (Cap 329); and,
- *Money Lenders Ordinance* (Cap 163).

III. ELEMENTS

In order to have a legally binding agreement, certain requirements must be fulfilled. Those requirements are that:

- the parties must have the intention to create a legal relationship;
- the parties must be in agreement;
- the parties' agreement must be supported by consideration or be made under seal;
- the agreement's terms must be sufficiently certain to enable enforcement; and,
- the parties must have the capacity to enter into a contract.[33]

The first three requirements are presented below. The last two requirements of a contract, *i.e.*, certainty of terms and capacity, are discussed in sections IV and V respectively.

A. Intent

For an agreement to be an enforceable contract, the parties must have the intention to create a legally binding relationship. In other words, the parties to the agreement intend it to be enforceable in court. Intention is determined objectively from the circumstances, including the nature of the words used or the conduct of the party making the offer.

In business transactions, there is a presumption that the agreement is intended to be legally binding.

> Indeed, the presumption in favour of intention in commercial agreements is so strong that it is rarely challenged. The presumption will be rebutted, however where the commercial agreement clearly states that it does not create legally binding obligations.[34]

In social or domestic situations, unless the parties state otherwise, the law presumes that such agreements are not intended to be legally binding. *Wu Chiu Kuen v Chu Shui Ching* (1992) HCA 4081/1991, [1992] HKCU 29

33. *See, e.g.*, Charles Wild & Stuart Weinstein, Smith and Keenan's English Law: Text and Cases 288 (16th ed. 2010) [hereinafter Smith and Keenan].
34. Hall, *supra* note 3, at 310.

is an example of a social situation where the plaintiff successfully asserted the existence of an intent to create a legal relationship. The case revolved around a *mah jong* parlour patron who purportedly agreed to share any Mark Six lottery winnings with the *mah jong* parlour employee sent to purchase the tickets. The employee contributed one-half the purchase price of the tickets. The court held that the plaintiff rebutted the presumption that this was a social arrangement and found in favour of the plaintiff.[35]

In the case of *Balfour v Balfour* [1919] 2 KB 571, the court found an agreement for the payment of maintenance between spouses to be unenforceable as it was a domestic agreement. The court presumed that the parties did not intend to create any legal relationship. In the case of *Jones v Padavatton* [1969] 1 WLR 328, the court held that family agreements were dependent upon the good faith of the parties in keeping the promises made and that the parties did not intend to make binding agreements. The case of *Sun Er Jo v Lo Ching* [1996] 1 HKC 1 involved the mother suing her children, particularly one claim for the expenses incurred in raising the youngest child. The court held in relation to the plaintiff's claim for rearing expenses that:

> it was right and proper that parents bring up their children and this did not form a basis for a compensation claim. Family arrangements made between parents and children, husband and wife, or brothers and sisters were generally not legally binding, unless it was shown that they have clearly intended to enter into legal relations.[36]

B. Agreement

There must be an agreement between the parties to a contract before one party can enforce another party's promise.

> Agreement is usually reached by the process of offer and acceptance … the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made.[37]

Thus, at times, courts will use the offer-and-acceptance approach to determine the existence and also the terms of a contract. Some courts are willing to be flexible where the words and conduct are unclear. These courts would

35. *See id.* at 306–309 for a discussion of this case.
36. [1996] 1 HKC at 3. (Headnotes)
    See discussion in HALL, *supra* note 3, at 296–304.
37. 7(2) HALSBURY'S, *supra* note 1, at para. 115.026 (citations omitted).

look at all the circumstances at the time of the agreement to determine whether a contract was formed. However, for certain particular agreements, such as contracts under seal, the identification of offer and acceptance is not necessary.[38]

Consequently, this chapter uses this offer-and-acceptance approach. The following section concentrates on an offer-and-acceptance analysis. As contracts under seal are, comparatively, less commonly encountered, this type of legally binding agreement is presented in a later section.

i. Offer

An "offer" is a promise to do, or to refrain from doing, something in the future. An offer is also a display of willingness to enter into a contract on specified terms, made in such a way that a reasonable person would understand that an acceptance will result in a legally binding agreement.[39] Consequently, once an offer is accepted, a contract exists between the parties.

The party making an offer is the "offeror", also referred to as the "promisor". The party to whom this offer is made is the "offeree", also referred to as the "promisee". An offer may be made expressly, *i.e.*, by spoken or written words. An offer may also be made impliedly, *i.e.*, by conduct of the parties or by law.

An example of an implied contract by conduct is provided in the following example. A bus arrives at one of its designated stops along its route. A person gets on the bus and pays the specified bus fare. By conduct, the individual and the bus company have entered into a legally binding agreement (exceptions to creating a legally enforceable agreement are discussed later). The agreement in this example is that the person will pay the specified fare and the bus company will convey the person to one of the designated bus stops near the person's destination.[40] No words need to be spoken or written in this example.

38. If the contract is a formal written agreement, such as an agreement under seal, it would then be unnecessary to identify the offer and the acceptance. Contracts under seal are comparatively less frequently used and will be discussed later. Also note that the offer-and-acceptance examination by the courts sometimes remain important in determining the terms, rather than the existence, of a written contract.
See CHITTY, *supra* note 2, at para. 2–110 for a discussion of the difficulty in applying an offer-and-acceptance analysis.
39. BLACK'S LAW DICTIONARY, *supra* note 12, at 1111.
40. CHITTY, *supra* note 2, at para. 1–076.

An implied contract by law would involve contract terms imposed by statute rather than negotiated by the parties. Such terms may involve matters such as employment (anti-discrimination), consumer protection, etc.

An offer must be made with the intention that upon acceptance, the offer and acceptance shall become binding in law.

> When determining whether an offer had been made, one should identify "an expression of willingness to contract on certain terms made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed". The person effecting such expression is the offeror even though he may not have initiated the contact.
>
> It is difficult at times to determine which statements or which acts constitute an offer. It is particularly difficult where the parties are indiscriminate with the use of words. The test of an offer is the intention of an expression and not the words used.[41]

Thus, a statement will not be an offer if it is merely intended to supply information. Merely fixing a price does not imply an offer to buy or sell.

In the case of *Harvey v Facey* [1893] AC 552, Harvey sought specific performance[42] of an agreement for the sale of a property named *Bumper*

41. Ho, *supra* note 13, at 6.

42. "Specific performance" is defined as an equitable remedy whereby a court orders a party to a contract to specifically perform its obligations under the contract. This type of remedy for breach of contract is discussed later in this chapter.
BLACK'S LAW DICTIONARY, *supra* note 12, at 1297 defines "equitable remedy" as "a non-monetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury".
Id. at 560 defines "equity" as:

> (1) Fairness; impartiality; evenhanded dealing.
> (2) The body of principles constituting what is fair and right; natural law.
> (3) The recourse to principles of justice to correct or supplement the law as applied to particular circumstances.
> (4) The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict.

As explained by FISHER & GREENWOOD, *supra* note 17, at 13:

> The maxims of equity still direct the courts in the exercise of their discretion whether or not to grant equitable relief. The principle that "he who comes to equity must come with clean hands" means that equitable remedies or "relief", will only be granted to those who have acted fairly in respect of the contract. The principle that "he who seeks equity must do equity" means that equitable relief will be granted only where the claimant is prepared to comply with the requirements of the court to do justice to the other party.

The *BLIS Glossary*, *supra* note 2, translates "equity" as 衡平法, "equitable relief" as 衡平法濟助. "Equitable remedy" is translated as 衡平法補救.

Hall Pen. The issue in this case involved the question of whether a legally binding sale and purchase agreement existed. The events transpired in the following sequence:

- Harvey telegraphs Facey, asking, "Will you sell Bumper Hall Pen? Telegraph lowest price for Bumper Hall Pen."
- Facey answers, "Lowest price for Bumper Hall Pen [would be] £900."
- Harvey responds by agreeing to buy the property for Facey's asking price of £900.

All these telegrams are duly received by Harvey and Facey so that there are no difficulties with communications.

Harvey argued that the telegraph correspondence was an implied acceptance of the first question in the first telegram. The court, however, decided that any contract must be determined from the telegrams, that Facey's response was a statement of the lowest price at which he would sell, and that the telegrams contained no implied contract to sell to the person making the inquiry.

The court held that there was no contract between these parties for the following reasons:

- The first telegram asked two questions. The first question concerned the willingness of Facey to sell the property to Harvey. The second question asked the lowest price. The word "telegraph" was addressed to only the second question.
- Facey replied to the second question only. By stating that £900 was the lowest price, Facey gave a precise answer to a precise question—the selling price.

Harvey's next telegram treated Facey's statement of a £900 sale price as an unconditional offer to sell to Harvey at that stated price.

The court found that Facey's telegram was only binding on him as to the £900 sale price and that the telegram was merely an offer to sell the property at a price of £900 because all the other terms of purchase were yet to be negotiated. Harvey's reply telegram could only be treated as an acceptance of Facey's offer to sell the property at a price of £900. Harvey's telegram was an offer to purchase the property for £900 to be accepted by Facey. Thus, the contract could only be completed if Facey had accepted Harvey's last telegram.

a. Bilateral and Unilateral Contract

An offer can be made to a particular person, a particular group of persons or to the public at large. Where it is made to a particular person or a particular group of persons, a contract is formed when the offeree accepts the offer. Such a contract is known as a "bilateral contract". Bilateral contracts thus are generally formed after negotiations have taken place resulting in a promise in exchange for another party's promise. Both parties make binding promises, and one promise is consideration for the other promise. As succinctly and simply summarized by one author:

> A bilateral contract consists of an exchange of promises. A "bilateral" offer, therefore, seeks a *promise* in return, eg Offer–"I [promise that I] will sell you my car for £500." Acceptance–"I [promise that I] will pay £500 for your car."[43]

As presented earlier, a unilateral contract involves a promise by the offeror followed by performance by the offeree, rather than an exchange of promises. Unilateral contracts may arise in advertisements of rewards, or agreements for contingency fees, *e.g.*, estate broker's contract. Where an offer is made to the public at large, a contract is formed when anyone performs the act requested in the offer. A contract thus formed is known as a unilateral contract. An offer arising from an advertisement may be an example of a unilateral contract where the offeror may be unaware of acceptance, until an offeree has performed according to the terms of the offer contained in the advertisement. In a unilateral contract only one party makes a promise; the offer is accepted by performing the requested act specified in the offer. The offeree does not make any promise(s). Compare this to a bilateral contract, where negotiations have taken place resulting in a promise in exchange for another's promise.[44]

43. Marnah Suff, Essential Contract Law 2 (2nd ed. 1997) [hereinafter Suff].
44. *Id.*
See section III.B.ii.c, "Invitation to Treat", and the discussion of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
As presented in Ho, *supra* note 13, at 45:

> A unilateral contract is a contract whereby one party promises certain consideration to another where such other makes no counter promise and has no obligations but would be entitled to the consideration promised by the offeror if he satisfied the terms of the promise. The common example is the promise of a reward for the return of lost articles or provision of information.

Traditional theory was that the offeror may revoke the offer at any time prior to complete performance, even after the offeree has commenced performance. Today, the commonly accepted view is that the offeror cannot withdraw the offer once the offeree has started to perform the required act.[45] Further, the offeree is not required to notify the offeror of performance, unless the offeror is located at a distance and would be unaware of the performance. This notice prevents the offeror from entering a contract with another person for the same purpose.

In bilateral, or even multilateral, contract situations, an offer must be communicated to an offeree and an acceptance must be communicated to the offeror. Generally, one cannot accept an offer unless one has knowledge of the offer.[46] The offer must be directed to a party entitled to accept; others who learn of the offer are not entitled to accept.

b. Termination of Offer

An offer is terminated by:

- rejection by the offeree;
- revocation by the offeror;
- lapse of time;
- death or other incapacity of one of the parties; or,
- where the offer is conditional, failure of the condition to materialize.

The offeror can revoke or withdraw the offer at any time before acceptance is made by the offeree. If the offeror decides to revoke the offer, the notice of revocation must be communicated to the offeree before acceptance.[47] The offeror, as part of the offer, may dictate the manner through which the offeree must make acceptance.[48] The general rule is that an acceptance of an offer must be communicated to the offeror before revocation of the offer or before the offer terminates through the lapse of time or

45. FISHER & GREENWOOD, *supra* note 17, at 71–73.
See CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 75–78 (M. P. FURMSTON, ed., 15th ed. 2007) [hereinafter FURMSTON].

46. This acceptance must be made with the knowledge of the existence of the offer. The offer must be the reason for the acceptance, and there must be a "meeting of the minds" prior to performance. For example, identical offers, one to buy and one to sell, that "cross" in the mail do not create a contract if neither offer was accepted with the knowledge of its existence. CHITTY, *supra* note 2, at para. 2–027.

47. For further discussion, *see, e.g.*, 7(2) HALSBURY'S, *supra* note 1, at para. 115.039; CHITTY, *supra* note 2, at paras. 2–087 to 2–091.

48. For a detailed discussion, *see, e.g.*, 7(2) HALSBURY'S, *supra* note 1, at para. 115.054; CHITTY, *supra* note 2, at paras. 2–027 to 2–086.

otherwise. (An exception to this general rule is where there is an offer of reward.) Revocation is effective if it is communicated in a manner equal to or greater than the way the offer was publicized, even though the offeree has no knowledge of the revocation.

If an offer has been rejected by the offeree, the offer cannot be later accepted. *Lee Siu Fong Mary v Ngai Yee Chai* [2006] 1 HKC 157 is a recent case upholding this principle. In this case, Lee made loans to Ngai which were only partially repaid. Ngai offered to repay the outstanding amount over six years. Lee rejected the offer. Seven years later, Lee brought a court action to recover the outstanding amount of the loans. Ngai's defence was that Lee waited too long to take court action so that the plaintiff is now time-barred from suing. Lee's counter-argument was that Ngai's offer to repay the loans prevented the defendant from claiming this defence. The court held:

> The truth of the matter is that having rejected this offer … on 21 May 1995 there was no further offer … from the defendant for the plaintiff to accept later on. There was no evidence that the defendant had intended to leave the offer open so that it may be accepted by the plaintiff at some later time. There was also no evidence that the parties had discussed the time of repayment again after the offer was rejected by the plaintiff.
>
> An offer … is simply an expression of willingness to contract made with the intention that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed … If the offer was rejected by the plaintiff, she could not unilaterally revive it by saying that she had later accepted it. …
>
> … the fundamental point is that there must be an offer or representation made by one party for the other party to accept or relied [*sic*] upon. The so-called representation by the defendant in this case was exactly the same offer he had made and rejected by the plaintiff. Once this was rejected then there was nothing for the plaintiff to rely upon …[49]

c. Options

An "option" is where an offeror promises to keep the offer open for a specified time and the offeree pays for this promise. This is a separate contract, known as a "collateral contract", between the promisor and the promisee

49. [2006] 1 HKC at 161.