

CONTENTS

| | |
|-----------------------------------|-------|
| <i>Preface</i> | vii |
| <i>Explanatory Note</i> | ix |
| <i>List of Authors</i> | xi |
| <i>Table of Cases</i> | xxvii |
| <i>Table of Legislation</i> | lxvii |

CHAPTER 1 LEGAL SYSTEM OF HONG KONG

Arthur McInnis and Stephen Chan

| | |
|---|----|
| 1. Introduction..... | 3 |
| 2. Meaning of a Legal System and Law | 3 |
| (a) What is a legal system? | 3 |
| (b) What is law? | 4 |
| (c) The functions of law..... | 5 |
| (d) The importance of law to business..... | 5 |
| 3. Classifications and Sources of Law..... | 7 |
| (a) Classifications of law | 7 |
| (b) Sources of law | 9 |
| (c) Literary sources of law..... | 15 |
| 4. Legal Processes—Creation, Interpretation, and Application of Laws..... | 21 |
| (a) Creation of laws | 22 |
| (b) Interpretation of laws | 24 |
| (c) The doctrine of precedent..... | 27 |
| 5. Legal Institutions | 29 |
| (a) Bodies involved in the legislative process | 30 |
| (b) Law enforcement bodies | 30 |
| (c) Department of Justice..... | 30 |
| (d) Legal Aid Department..... | 32 |
| (e) Courts and tribunals | 32 |
| 6. Legal Personnel..... | 42 |
| (a) Secretary for Justice | 43 |
| (b) Lawyers—solicitors and barristers..... | 43 |

CHAPTER 2 CONTRACT LAW

| | |
|--|-----|
| <i>D. K. Srivastava</i> | |
| 1. Introduction..... | 50 |
| 2. Making a Contract | 50 |
| (a) Unilateral and bilateral contracts | 50 |
| (b) The essential elements of a contract..... | 51 |
| (c) Consideration | 71 |
| (d) Intention to create legal relations | 93 |
| 3. Who can Make a Contract?—Capacity of Parties | 99 |
| (a) Contracts made by minors..... | 100 |
| (b) Contracts made by mentally disordered, drunk, or drugged persons..... | 104 |
| (c) Contracts made by companies..... | 105 |
| 4. What are the Terms of the Contract?..... | 105 |
| (a) Mere representation and contractual terms | 106 |
| (b) Express and implied terms | 108 |
| (c) Conditions, warranties, and innominate terms..... | 113 |
| (d) Distinguishing contractual terms from conditions precedent and subsequent | 120 |
| (e) Interpretation and construction of terms | 121 |
| 5. Exemption Clauses | 126 |
| (a) Incorporation of the exemption clause into a contract..... | 127 |
| (b) Construction of an exemption clause—Is the wording clear? | 133 |
| (c) Control of Exemption Clauses Ordinance..... | 135 |
| 6. Vitiating Factors | 140 |
| (a) Mistake..... | 140 |
| (b) Misrepresentation..... | 149 |
| (c) Duress..... | 164 |
| (d) Economic duress | 165 |
| (e) Undue influence | 166 |
| (g) Illegality | 181 |
| (h) Restraint of trade | 190 |
| 7. Discharge of Contract | 197 |
| (a) Discharge by performance or defective performance | 198 |
| (b) Discharge by agreement..... | 201 |

http://www.bookshop.com

CHAPTER 3 SALE OF GOODS*Charu Sharma*

| | |
|--|-----|
| 1. Introduction..... | 231 |
| 2. Definition of a Contract of Sale..... | 233 |
| (a) Goods..... | 234 |
| (b) Price..... | 239 |
| 3. Classification of Goods..... | 243 |
| 4. Formalities | 244 |
| 5. Terms of the Contract | 244 |
| (a) Conditions and warranties..... | 247 |
| (b) Innominate terms..... | 249 |
| (c) Time for performance | 250 |
| 6. Statutory Implied Terms in a Sale of Goods Contract..... | 252 |
| (a) Implied terms as to title..... | 252 |
| (b) Implied warranties as to goods being free from encumbrances and quiet possession..... | 255 |
| (c) Implied terms in a sale by description..... | 256 |
| (d) Implied term as to merchantable quality | 260 |
| (e) Implied term as to fitness for a particular purpose..... | 271 |
| (f) Implied terms in a sale by sample | 274 |
| (g) Implied terms and exclusion clauses..... | 276 |
| 7. Sale by Non-owner | 278 |
| (a) The exceptions to the <i>nemo dat</i> rule | 279 |
| (b) Sale by a mercantile agent..... | 281 |
| (c) Sale in market overt | 284 |
| (d) Sale under a voidable title | 285 |

| | |
|---|-----|
| (e) Seller in possession | 285 |
| (f) Buyer in possession..... | 288 |
| 8. Transfer of Property..... | 290 |
| (a) Passing of property—specific or ascertained goods | 290 |
| (b) Passing of property—unascertained goods | 295 |
| 9. Remedies for Breach of Contract..... | 300 |
| (a) Remedies for the seller..... | 300 |
| (b) Unpaid seller's right of stoppage in transit | 304 |
| (c) Seller's right of resale | 305 |
| (d) Action for the price | 305 |
| (e) Remedies of the buyer..... | 309 |
| (f) Buyer's loss of the right to reject..... | 310 |

CHAPTER 4 PAYMENT SYSTEMS*Rajesh Sharma*

| | |
|--|-----|
| 1. Introduction..... | 323 |
| 2. Currency..... | 323 |
| 3. Credit and Debit Cards | 323 |
| (a) The origin of credit cards | 324 |
| (b) Mechanics of the payment system | 325 |
| (c) Contractual basis | 326 |
| (d) Problems relating to credit cards | 326 |
| (e) Debit cards and ATM cards | 329 |
| 4. Letters of Credit | 329 |
| (a) The operation of a letter of credit..... | 330 |
| (b) Revocable and irrevocable letters of credit..... | 330 |
| (c) Rule of strict compliance | 331 |
| 5. Promissory Notes | 332 |
| (a) Writing and signature | 333 |
| (b) Promise or engaging to pay | 334 |
| (c) An unconditional promise to pay | 335 |
| (d) Promise must be to pay money only | 335 |
| (e) The sum must be certain | 336 |
| (f) Payee must be certain..... | 336 |
| (g) A promissory note must be payable to a bearer or an order..... | 337 |

| | |
|---|-----|
| 6. Bills of Exchange..... | 338 |
| (a) Parties to a bill of exchange | 339 |
| 7. Cheques..... | 341 |
| (a) Difference between a cheque and a bill of exchange | 341 |
| 8. Negotiation of Bills, Notes, and Cheques..... | 342 |
| (a) Methods of negotiation | 342 |
| 9. Endorsement | 343 |
| (a) Types of endorsement | 343 |
| 10. Payment of Bills, Notes, and Cheques..... | 344 |
| (a) Payment made on or after maturity | 345 |
| (b) Payment made in good faith..... | 345 |
| (c) Presentment for payment..... | 345 |
| (d) Acceptance | 346 |
| (e) Presentment for acceptance | 348 |
| 11. Liabilities of Parties and Discharge from Liabilities | 348 |
| (a) Liability of the acceptor | 348 |
| (b) Liability of the drawer | 349 |
| (c) Liability of the endorser | 349 |
| (d) Dishonour by non-payment | 349 |
| (e) Dishonour by non-acceptance | 349 |
| (f) Notice of dishonour | 350 |
| (g) Noting and protest | 351 |
| 12. Bitcoin | 351 |

CHAPTER 5 A LEGAL GUIDE TO E-COMMERCE*Aashish Srivastava*

| | |
|---|-----|
| 1. Introduction | 355 |
| 2. What is E-commerce? | 355 |
| (a) The issue of writing and signature in e-commerce | 355 |
| (b) Writing and e-commerce | 355 |
| (c) What is information? | 356 |
| (d) What is an electronic record? | 356 |
| (e) Is the information contained in the electronic record accessible so as to be usable for subsequent reference? | 357 |

| | |
|---|-----|
| 3. Signature and E-commerce..... | 357 |
| (a) What is a signature? | 357 |
| (b) Electronic signature..... | 358 |
| (c) Digital signature..... | 358 |
| (d) Terms associated with digital signatures..... | 358 |
| (e) Functions of a digital signature..... | 360 |
| (f) Implementation of the digital signature | 360 |
| (g) Hong Kong: Electronic signature or digital signature? | 363 |
| (h) Case law on electronic signatures | 364 |
| 4. Electronic Contracts..... | 368 |
| (a) Formation of an electronic contract | 368 |
| (b) Shrink-wrap, click-wrap, and browse-wrap agreements..... | 373 |
| (c) Must a contract be in writing?..... | 374 |
| (d) Must a contract contain a signature?..... | 374 |
| (e) E-commerce and agency—the electronic agent..... | 375 |
| (f) E-commerce and consumer protection..... | 376 |
| 5. E-commerce and Spam | 378 |
| (a) What is spam? | 378 |
| (b) E-commerce and domain names | 379 |
| 6. Conclusion | 382 |

CHAPTER 6 AGENCY LAW

D. K. Srivastava

| | |
|---|-----|
| 1. Introduction..... | 387 |
| 2. Agency and Other Relationships | 389 |
| 3. Classes of Agent | 390 |
| (a) Factors, mercantile agents, and brokers | 391 |
| (b) <i>Del credere</i> agents..... | 392 |
| (c) Confirming agents..... | 392 |
| (d) Auctioneers | 392 |
| (e) Partners..... | 393 |
| (f) Estate agents..... | 393 |
| 4. Methods of Creating Agency | 393 |
| (a) Agency by contract | 394 |
| (b) Agency by ratification..... | 399 |

| | |
|---|-----|
| (c) Apparent authority or agency by estoppel | 401 |
| (d) Agency of necessity | 408 |
| (e) Presumption of authority from cohabitation | 410 |
| 5. Rights of Agents | 410 |
| (a) Right to remuneration | 410 |
| (b) Reimbursement and indemnity | 413 |
| (c) Lien | 414 |
| 6. Duties of Agents | 415 |
| (a) Duty to follow the principal's instructions..... | 415 |
| (b) Duty of care and skill | 415 |
| (c) Conflict of interests | 418 |
| (d) Bribes and secret commission | 419 |
| (e) Duty to account | 421 |
| 7. Principal's Relation with Third-Party | 421 |
| (a) Disclosed principal..... | 421 |
| (b) Undisclosed principal..... | 422 |
| (c) Third-party's rights against undisclosed principal..... | 425 |
| (d) Principal's liability for agent's tort | 426 |
| 8. Agents and Third Parties | 427 |
| (a) Warranty of authority | 427 |
| (b) Agent's liability in contract | 428 |
| (c) <i>Agent's liability in tort</i> | 429 |
| (d) <i>Exemption and limitation clauses and agents</i> | 429 |
| 9. Determination of Agency | 430 |
| (a) By agreement | 430 |
| (b) By notice of termination | 430 |
| (c) By completion of the task | 431 |
| (d) By expiry | 431 |
| (e) By frustration | 431 |
| (f) By death, mental incapacity, bankruptcy, or closing of business | 431 |
| (g) Limitations on termination | 431 |
| (h) Consequences of termination | 432 |

CHAPTER 7 COMPANY LAW

| | |
|--|-----|
| 1. Introduction..... | 436 |
| 2. Incorporation Process | 436 |
| (a) Choose a name for the company | 437 |
| (b) Articles of association..... | 438 |
| (c) Incorporation form | 438 |
| (d) Registration fee | 438 |
| (e) Certificate of incorporation | 439 |
| (f) Business registration certificate | 439 |
| (g) First board meeting | 439 |
| 3. Shelf Companies..... | 440 |
| 4. Advantages and Disadvantages of Incorporation | 440 |
| (a) Advantages..... | 440 |
| (b) Disadvantages | 441 |
| (c) Conclusion..... | 442 |
| 5. Concept of Separate Legal Entity and Limited Liability..... | 442 |
| (a) General principle..... | 442 |
| (b) Piercing the corporate veil | 445 |
| 6. Definition of a Private Company | 455 |
| (a) Restriction on the right of transfer | 455 |
| (b) Restriction on the number of shareholders..... | 456 |
| (c) Prohibition against invitation to the public | 457 |
| (d) Advantages of a private company | 457 |
| 7. Articles of Association..... | 458 |
| (a) Articles of association..... | 458 |
| (b) Mandatory provisions..... | 459 |
| (c) Alteration of the mandatory provisions of articles of association..... | 460 |
| (d) Optional provisions | 462 |
| (e) Alteration of the optional provisions of articles of association..... | 466 |
| (f) Other provisions of articles of association..... | 467 |
| (g) Alteration of other provisions of articles of association | 468 |
| (h) The effect of the articles..... | 469 |

Dennis Hie

| | |
|--|-----|
| 8. Management and Control..... | 472 |
| (a) The general meeting..... | 473 |
| (b) The board meeting..... | 479 |
| (c) Division of power..... | 482 |
| 9. Directors and Company Secretary | 484 |
| (a) Definition of director..... | 484 |
| (b) Who may be a director? | 484 |
| (c) Who may not be a director? | 485 |
| (d) Who can appoint a new director?..... | 486 |
| (e) Alternate directors..... | 486 |
| (f) Reserve director | 486 |
| (g) Removal of directors | 487 |
| (h) Role of Company Secretary | 488 |
| 10. Directors' Duties..... | 488 |
| (a) Under common law | 488 |
| (b) Codification of directors' duties..... | 498 |
| (c) Statutory duties..... | 499 |
| (d) Relief from the Court | 502 |
| 11. Protection of Minority | 503 |
| (a) The democracy principle..... | 503 |
| (b) The rule in <i>Foss v Harbottle</i> | 503 |
| (c) Common law exceptions to the rule in <i>Foss v Harbottle</i> | 504 |
| (d) Statutory protection of minority | 507 |
| 12. Financing | 513 |
| (a) Share capital (equity) | 513 |
| (b) Loan capital (debt) | 514 |
| 13. Liquidation..... | 514 |

CHAPTER 8 PARTNERSHIP LAW*Dennis Hie*

| | |
|---|-----|
| 1. Introduction..... | 518 |
| 2. Meaning of Partnership..... | 518 |
| (a) Meaning of a business | 518 |
| (b) Meaning of carrying on a business in common | 518 |
| (c) Meaning of a firm..... | 519 |

| | |
|--|-----|
| 3. Governing Law | 520 |
| 4. Formation of a Partnership | 521 |
| (a) Co-ownership | 521 |
| (b) Sharing of profits..... | 522 |
| 5. Relationship Between Partners | 523 |
| (a) Action for debt | 523 |
| (b) Fiduciary duties..... | 524 |
| (c) Contractual relationship | 526 |
| 6. Liability of Partners to a Third-party..... | 529 |
| (a) Joint and several liability | 529 |
| (b) Agents as partners | 530 |
| (c) Retirement..... | 535 |
| 7. Dissolution of Partnership | 538 |
| (a) Dissolution by partners | 539 |
| (b) Dissolution by law..... | 539 |
| (c) Dissolution by the court | 539 |
| (d) Liability of partners on dissolution | 540 |
| 8. Limited Partnership | 541 |

CHAPTER 9 TORT LAW*D. K. Srivastava*

| | |
|---|-----|
| 1. Introduction..... | 546 |
| 2. Types of Tortious Liability..... | 548 |
| (a) Remedies..... | 548 |
| (b) Tort and crime..... | 549 |
| (c) Tort and contract | 549 |
| 3. Negligence: Duty of Care | 549 |
| (a) The existence of a duty of care | 550 |
| 4. Duty of Care: Pure Economic Loss Caused by a Negligent Act | 561 |
| (a) What is a “Pure Economic Loss”? | 562 |
| (b) Pure economic loss caused by a negligent act | 562 |
| (c) Pure economic loss caused by a negligent statement..... | 565 |
| (d) Tortious liability for negligent statement..... | 566 |
| (e) Existence of a special relationship | 568 |

| | |
|--|-----|
| (f) Proximity and voluntary assumption of responsibility | 569 |
| (g) Professional advice in a social context..... | 572 |
| (h) Passive sufferer | 573 |
| 5. Duty of Care: Products Liability..... | 574 |
| (a) General principle of liability | 574 |
| (b) The scope of manufacturers’ liability | 575 |
| (c) Causation..... | 576 |
| (d) Consumer’s injuries caused by the consumer’s own negligence..... | 577 |
| (e) No tortious liability for pure economic loss..... | 578 |
| 6. Breach of Duty..... | 578 |
| (a) An objective standard—test of reasonable person..... | 578 |
| (b) Determining compliance with the required standard | 582 |
| 7. Causation | 586 |
| (a) Causation in fact..... | 586 |
| (b) Causation in law (remoteness of damage) | 592 |
| 8. Defences to Negligence | 600 |
| (a) Contributory negligence | 600 |
| (b) <i>Volenti non fit injuria</i> | 605 |
| (c) <i>Volenti non fit injuria</i> and drunk driving | 607 |
| (d) Exclusion of liability | 608 |
| (e) Illegality | 609 |
| (f) Limitation period..... | 613 |
| (g) Limitation period for personal injuries | 613 |
| 9. Vicarious Liability | 615 |
| (a) Employers’ liability for wrongs committed by employees | 616 |
| (b) Course of employment | 619 |
| (c) Vicarious liability for employee’s negligent and intentional wrongdoings | 621 |
| (d) Employer’s duty of care and liability for negligence of employees | 623 |
| (e) Employers’ liability for the acts of independent contractors | 626 |
| (f) Car owners or car users’ liability for drivers’ negligence..... | 627 |
| 10. Occupiers’ Liability | 629 |
| (a) Occupier’s duty to visitors | 629 |
| (b) Common duty of care | 634 |
| (c) Defences | 641 |
| (d) Trespassers | 645 |

| | |
|------------------------------|-----|
| 11. Defamation..... | 648 |
| (a) Essential elements | 648 |
| (b) Defences..... | 655 |
| (c) Remedies..... | 668 |

CHAPTER 10 EMPLOYMENT LAW*James Parker,**Anthony Upham, and Lin Feng*

| | |
|--|-----|
| 1. Introduction..... | 677 |
| 2. Contracts of Employment | 677 |
| 3. Who can be Employed?..... | 678 |
| 4. Contracts for Services..... | 679 |
| 5. Application of the Employment Ordinance..... | 680 |
| 6. Application of Contract Law | 681 |
| 7. Rights Under the Employment Ordinance..... | 682 |
| 8. Probation..... | 683 |
| 9. Sickness Pay | 684 |
| 10. Rest Days | 686 |
| 11. Holidays | 688 |
| (a) Annual leave with pay..... | 689 |
| (b) Annual shutdowns..... | 690 |
| (c) Payment in lieu of leave..... | 691 |
| (d) Annual leave pay and termination of employment | 692 |
| 12. Wages..... | 693 |
| (a) What are “wages”?..... | 693 |
| (b) How should my employer pay me?..... | 695 |
| (c) Bonus payments | 695 |
| (d) Deductions from wages..... | 697 |
| 13. Minimum Wages | 698 |
| (a) Hours worked..... | 699 |
| (b) Meal break..... | 700 |
| (c) On-call or standby time..... | 700 |
| (d) Wage period | 700 |

| | |
|--|-----|
| (e) Payment for meal break and rest days..... | 700 |
| (f) Counting of commission | 701 |
| (g) Contracting out..... | 701 |
| (h) Duty to record the total number of hours worked..... | 702 |
| 14. Retirement Benefits | 702 |
| 15. Severance Payments | 706 |
| 16. Severance Payments and Long-service Payments | 716 |
| 17. Employees’ Compensation | 719 |
| 18. Trade Unions..... | 725 |
| (a) Trade union activities | 726 |
| 19. Termination of Employment..... | 727 |
| (a) Fraud or dishonesty by an employee as a valid reason for dismissal..... | 734 |
| (b) Habitual neglect of duties as a valid reason for dismissal | 736 |
| (c) Lack of capability by the employee as a valid reason for dismissal | 736 |
| (d) Ill-treatment by an employer | 738 |
| (e) Remedies for unreasonable dismissal | 739 |
| (f) Restrictions upon notice | 740 |
| (g) Termination payments..... | 741 |
| 20. Apprenticeship Contracts..... | 741 |
| (a) Effect of Apprenticeship Ordinance..... | 741 |
| (b) Purpose of apprenticeship agreements | 742 |
| (c) Form of apprenticeship agreements | 742 |
| (d) Protection of apprentices..... | 743 |
| 21. The Labour Tribunal..... | 745 |
| 22. Discrimination, Disability, and Sexual Harassment in the Workplace..... | 752 |
| (a) Gender discrimination | 753 |
| (b) Job advertisements and interviewing | 754 |
| (c) Marital status..... | 755 |
| (d) Pregnancy | 756 |
| (e) Disability discrimination | 757 |
| (f) Family status discrimination | 759 |
| (g) Race discrimination..... | 760 |
| (h) Sexual harassment..... | 761 |

| | |
|---|-----|
| (i) Disability harassment | 763 |
| (j) Racial harassment..... | 764 |
| (k) Anti-victimisation measures..... | 764 |
| (l) Employers' responsibility | 765 |
| (m) Problems of proof in discriminatory situations..... | 766 |
| 23. Recruiting Workers from Overseas | 767 |
| (a) Getting a Hong Kong Identity Card..... | 768 |
| (b) Recruiting a domestic worker from overseas..... | 768 |

CHAPTER 11 ALTERNATIVE DISPUTE RESOLUTION

Christopher To

| | |
|---|-----|
| 1. Introduction..... | 778 |
| 2. Preventing Commercial Disputes | 780 |
| (a) Good faith negotiations | 780 |
| (b) Drafting appropriate provisions into the contract | 784 |
| 3. Ways to Resolve Disputes | 786 |
| (a) Negotiation..... | 786 |
| (b) Mediation | 788 |
| (c) Conciliation | 794 |
| (d) Adjudication..... | 795 |
| (e) DRA and DRBs..... | 797 |
| (f) Expert determination..... | 798 |
| (g) Early neutral evaluation | 800 |
| (h) Partnering | 801 |
| (i) Arbitration..... | 803 |
| (j) Courts | 810 |
| (k) Administrative Tribunals | 811 |
| 4. Conclusion | 813 |
| <i>Index</i> | 815 |