



BRIGGS AND BURROWS

THE LAW OF CONTRACT IN MYANMAR

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by

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အေဒရီယန် ဘရစ်ဂ်စ် (QC (Hon))

ပုဂ္ဂလိကအပြည်ပြည်ဆိုင်ရာဥပဒေ ပါမောက္ခ နှင့် စိန့် အက်ဒ်မန် ဟောင်း၏ ပညာရှင်အဖွဲ့ဝင်
အောက်စဖို့ဒ် တက္ကသိုလ်
နှင့်

အန်ဒရူး ဘားရိုးစ် (QC (Hon))

အင်္ဂလန်ဥပဒေ ပါမောက္ခ နှင့် အေလ် ဆိုးစ် ကောလိပ်၏ ပညာရှင်အဖွဲ့ဝင်
အောက်စဖို့ဒ် တက္ကသိုလ်

ရေးသားပြုစုသည်။



Preface

In this book we attempt to set out and explain the law of contract in Myanmar by reference to the Contract Act 1872 and a small number of other statutes forming part of the body of Myanmar law. We have sought to identify, read, and understand all the reported decisions on contract of the courts of this country since 1900 and to use these to show how well developed, in general, the law of contract in Myanmar actually is. We cannot promise to have found everything (or to have understood fully everything which we did find) but we hope that our work will serve three primary purposes.

The first and most important is to contribute to the restoration of legal education in the law schools of Myanmar. The law of contract is the foundation of all commercial law and a thorough understanding of contract law, and of contract law technique, is the rock on which much of the law is built. We are painfully aware that the universities in particular, and those who worked and studied in them, had the most difficult of times while contact with the outside world was cut off. Though that unhappy state of affairs has come to an end, it will take a while for the law schools to make up the ground which was lost. As far as we can see, thinking and writing about contract law was limited, and means that today's generation of teachers and students may need to be shown what can be done with the law of Myanmar. We hope that this book will prove useful to all those working in the universities.

A second purpose is to provide a statement of Myanmar contract law to those working in Myanmar but outside the universities – in commerce and in law offices but also, perhaps, in courts and government offices – who need to know the current state of Myanmar contract law. We also suggest, with those in government as our audience, that there are some minor reforms of the 1872 Act that are worth considering.

A final purpose is to explain the contract law of Myanmar to those from outside Myanmar but who have dealings with individuals and companies inside Myanmar. The more that is known about the laws of Myanmar, the more likely it is that contracts and other commercial relations will be regulated by the laws of Myanmar rather than by the laws of foreign countries.

We have not been able to read the judgments of courts reported only in Burmese; if there are such judgments relevant to the general law of contract, they form no part of our account. Having said that, though, we were told that the Union Supreme Court does not publish large numbers of judgments on contract law; and it may be that we have missed little. If anyone reading this book were able to draw our attention to judgments and other materials which we may have missed, we would be very grateful indeed.

We were much assisted in this project and have several debts of gratitude to acknowledge. First and foremost are the members of staff of the law schools of Yangon University, Dagon University, and East Yangon University. We each had the opportunity to deliver lectures and classes at these universities, and the kindness of our reception by our colleagues in these law schools was wonderful. We would also

like to thank those students and others who came to our classes and honoured us by their presence.

Next, thanks are due to those lawyers in practice in various capacities, in Myanmar, who spoke to us and answered our questions in 2015. We sought to find out how contract law – drafting, litigating – actually worked in practice; and to all those who gave us their time and the advantage of their opinions we are grateful.

We have been encouraged by many people – mostly, but not all, lawyers – in Myanmar to produce this book. We do not name them here, though they will know who they are. All we can really say is that we hope they will consider our efforts to have been helpful to them.

The work for this book was undertaken as part of the Burma/Myanmar Law Programme of the Oxford University Faculty of Law. We would like to thank the benefactors to that programme, especially Simon Makinson of Allen & Overy who has so generously encouraged and supported this project. We are also very grateful to Josh Htet of A&O who has assisted with the translation into Burmese of this preface and title pages. Considerable thanks are due to our excellent research assistant Krishnaprasad Kishakkevalappil: in particular, he produced a first draft of the history of the 1872 Act in Appendix 1 and he carried out the first trawl of the law reports, this done before AsianLii helped by making many of the useful series of law reports available on line. It is practically certain that, without this start, none of the rest of our work would have been possible. The Oxford University Press has kindly produced hard copies of the book as well as producing the electronic files which have enabled us to put up a professional version of this book on the internet. We would especially like to thank, from OUP, Alex Flach and Natalie Patey.

We have found our work in, and concerning, Myanmar, enormously rewarding. Our visits to the law schools there, though sadly much too short, have been intensely enjoyable. Our opportunity to explore and reflect on the Contract Act, and to think about what it tells us about the wider common law of contract, was one which, it is fair to say, we had not seen coming until very recently. We have benefited from working together in a way which we had not previously done and had not expected. We have looked at the material, and have reported our views, from different (but, we hope, complementary) perspectives; and the process of coming to agreement has been stimulating. Andrew Burrows wishes to make clear that Adrian Briggs has done the bulk of the work and produced the first draft of our text, albeit that all the work done thereafter was collaborative. The entire process has been a happy one and we are each grateful to the other and to Myanmar for what has turned out to be such an intellectually rewarding project.

It may be that a second edition of this book will be needed in due course. Anyone who finds fault with the text, or who wishes to draw our attention to things which we appear to have missed, is invited – please – to get in touch. We can be contacted most conveniently by e-mail (adrian.briggs@law.ox.ac.uk andrew.burrows@law.ox.ac.uk) or, in person, next time we are able to travel to Myanmar.

AB and AB
Oxford
December 1, 2016

နိဒါန်း

ဤစာအုပ်တွင် ကျွန်ုပ်တို့သည် ၁၈၇၂ ခုနှစ် ပဋိညာဉ်အက်ဥပဒေနှင့် မြန်မာဥပဒေပင်မကိုယ်ထည်၏ အစိတ်အပိုင်းအဖြစ် ပါဝင်ဖွဲ့စည်းထားသော အခြားဥပဒေအနည်းငယ်ကို ကိုးကား၍ မြန်မာနိုင်ငံ၏ ပဋိညာဉ် ဥပဒေကို ချပြရှင်းလင်းရန် ကြိုးစားထားပါသည်။ ကျွန်ုပ်တို့သည် ပဋိညာဉ်စာချုပ်စာတမ်းနှင့် ပတ်သက်ပြီး ၁၉၀၀ ခုနှစ်မှစ၍ ဤနိုင်ငံရှိ တရားရုံးများ၏ စာချုပ်စာတမ်းနှင့်ပတ်သက်သည့် ထုတ်ပြန်ဖော်ပြ ထားပြီးဖြစ်သော ဆုံးဖြတ်ချက်များ အားလုံးကို ဆန်းစစ်ဖော်ထုတ်ရန် နှင့် ဖတ်ရှုနားလည်ရန် ကြိုးစားလေ့လာထားပြီးဖြစ်ပြီး ၎င်းဆုံးဖြတ်ချက်များကို သုံးကာ မြန်မာနိုင်ငံ၏ ပဋိညာဉ်ဥပဒေသည် မည်မျှဖွံ့ဖြိုးပြီး ဖြစ်သည် မဖြစ်သည်ကို ပြသရန် ကြိုးစားထားပါသည်။ ကျွန်ုပ်တို့သည် အရာအားလုံးကို ရှာဖွေတွေ့ရှိထားသည်ဟု(သို့မဟုတ် ကျွန်ုပ်တို့ တွေ့ရှိထားသည့် အရာအားလုံးကို အပြည့်အဝ နားလည်သည်ဟု) ကတိမပြုနိုင်ပါ။ သို့သော် ကျွန်ုပ်တို့၏ ဆောင်ရွက်ချက်များသည် အဓိက ရည်ရွယ်ချက် ၃ ခု ကို ဖြည့်ဆည်းပေးနိုင်မည်ဟု မျှော်လင့်ပါသည်။

ပထမဆုံးနှင့် အရေးကြီးဆုံးမှာ မြန်မာနိုင်ငံ၏ ဥပဒေကျောင်းများတွင် ဥပဒေပညာရပ်များ ပြန်လည် ထိန်းသိမ်းဆောင်ရွက်နိုင်ရေးအတွက် အထောက်အကူဖြစ်စေရန် ဖြစ်ပါသည်။ ပဋိညာဉ်ဥပဒေသည် စီးပွားကူးသန်းရောင်းဝယ်ရေးဥပဒေများအားလုံး၏ အခြေခံအုတ်မြစ်ပင် ဖြစ်သည်။ ထို့အပြင် ပဋိညာဉ်ဥပဒေ နှင့် ပဋိညာဉ်ဥပဒေနည်းပညာကို ခရေဇေတွင်းကျ နားလည်ခြင်းသည် ဥပဒေအများစု တည်ဆောက်ထားသည့် အောက်ခံကျောက်စိုင်ကျောက်တုံးပင် ဖြစ်သည်။ ပြင်ပကမ္ဘာနှင့် အဆက်ပြတ်ခဲ့သည့် အချိန်တွင် အထူးသဖြင့် တက္ကသိုလ်များ နှင့် ယင်းတက္ကသိုလ်များတွင် အလုပ်လုပ်ခဲ့သူများနှင့် လေ့လာသင်ယူခဲ့သူများသည် အခက်ခဲဆုံးအချိန်များနှင့် ရင်ဆိုင်ခဲ့ရသည်ကို ကျွန်ုပ်တို့ နာကျင်စိတ်မကောင်းစွာ သတိပြုမိပါသည်။ ထိုအခြေအနေများ အဆုံးသတ်သွားခဲ့သော်လည်း ဥပဒေ ကျောင်းများသည် ယင်းတို့ နှစ်နာဆုံးရှုံးခဲ့မှုများအပေါ် ပြန်လည်ပြုပြင်တည်ဆောက်ရန် အချိန်အနည်းငယ် ယူရပါလိမ့်မည်။ ကျွန်ုပ်တို့ ရှုမြင်သလောက်ဆိုလျှင် ပဋိညာဉ်ဥပဒေအကြောင်း စဉ်းစားခြင်း နှင့် ရေးသားခြင်းတွင် ယခင်က အကန့်အသတ်ရှိခဲ့သည့်အတွက် မြန်မာဥပဒေကို အသုံးပြု၍ မည်မျှပင် လုပ်ဆောင်နိုင်သည်ကို ယနေ့မျိုးဆက် ဆရာများ နှင့် ကျောင်းသားများက ဖွင့်ဟထုတ်ဖော် ပြသရကောင်း ပြသရပါမည်။ ဤစာအုပ်သည် တက္ကသိုလ်များတွင် အလုပ်လုပ်နေကြသူ အားလုံးအတွက် အသုံးဝင်မည်ကို သက်သေပြနိုင်မည်ဟု ကျွန်ုပ်တို့ မျှော်လင့်ပါသည်။

ဒုတိယရည်ရွယ်ချက်မှာ မြန်မာနိုင်ငံတွင် အလုပ်လုပ်နေကြသူများအတွက် သို့သော် တက္ကသိုလ်ပြင်ပ၌၊ စီးပွားကူးသန်းရောင်းဝယ်ရေး နှင့် ဥပဒေရုံးများ၌၊ ထို့အပြင် တရားရုံးများနှင့် အစိုးရရုံးများ၌ မြန်မာ ပဋိညာဉ်ဥပဒေ၏လက်ရှိအခြေအနေကို သိရှိရန် လိုအပ်သူများအတွက် သဘောထား သုံးသပ်ချက်တစ်ခု ပံ့ပိုးပေးနိုင်ရန် ဖြစ်သည်။ ကျွန်ုပ်တို့၏ စာဖတ်ပရိသတ်များတွင် အစိုးရပိုင်း၌ လုပ်ဆောင်နေသူများ ပါဝင်သည့်အတွက် ၁၈၇၂ ခုနှစ် ပဋိညာဉ်အက်ဥပဒေကို အနည်းငယ်ပြင်ဆင်မှုအချို့ ပြုလုပ်ခြင်းကိုလည်း စဉ်းစားသင့်သည်ဟု အကြံပြုပါသည်။

နောက်ဆုံးရည်ရွယ်ချက်မှာ မြန်မာနိုင်ငံပြင်ပတွင် ရှိကြသော်လည်း မြန်မာနိုင်ငံအတွင်းရှိ လူပုဂ္ဂိုလ် တစ်ဦးချင်းစီ သို့မဟုတ် ကုမ္ပဏီများနှင့် ဆက်ဆံဆောင်ရွက်နေသူများအား မြန်မာနိုင်ငံ၏ ပဋိညာဉ် ဥပဒေ အကြောင်းကို ရှင်းပြနိုင်ရန် ဖြစ်ပါသည်။ မြန်မာနိုင်ငံ၏ ဥပဒေများကို ပိုမိုသိရှိလေလေ စာချုပ်စာတမ်းများနှင့် အခြားစီးပွားကူးသန်းရောင်းဝယ်ရေးဆိုင်ရာ ဆက်ဆံမှုများကို ပြည်ပနိုင်ငံများ၏ ဥပဒေများကို သုံးကာ ထိန်းကျောင်းနေရသည်ထက် မြန်မာဥပဒေများကို သုံးကာ ပိုမို၍ ထိန်းကျောင်းနိုင်ဖွယ် ရှိလာပါမည်။

မြန်မာဘာသာဖြင့်သာ ဖော်ပြခဲ့သည့် တရားရုံးဆုံးဖြတ်ချက်များကို ကျွန်ုပ်တို့ ဖတ်ရှုနိုင်ခြင်းမရှိခဲ့ပါ။ အကယ်၍ ယင်းဆုံးဖြတ်ချက်များသည် အထွေထွေ ပဋိညာဉ်ဥပဒေနှင့် သက်ဆိုင်ခဲ့လျှင် ကျွန်ုပ်တို့၏ စဉ်းစားသုံးသပ်မှုများတွင် ယင်းတို့ မပါဝင်ပါ။ ယင်းသို့ ပြောထားသည့်အတိုင်း ဖြစ်သော်လည်း ပြည်ထောင်စု တရားလွှတ်တော်ချုပ်သည် ပဋိညာဉ်ဥပဒေဆိုင်ရာ ဆုံးဖြတ်ချက် အရေအတွက် အများအပြားကို ထုတ်ဝေထားခြင်းမရှိဟု ကျွန်ုပ်တို့အား အသိပေးပြောဆိုကြပါသည်။ ထို့ကြောင့် ကျွန်ုပ်တို့ မသိရှိသည့် အပိုင်းမှာ အနည်းငယ်သာ ဖြစ်ကောင်း ဖြစ်နိုင်ပါသည်။ ဤစာအုပ်ဖတ်ရှုသူ မည်သူမဆို ကျွန်ုပ်တို့ မသိရှိလိုက်သည့် တရားရုံးဆုံးဖြတ်ချက်များနှင့် အခြားအကြောင်းအရာများ ရှိခဲ့၍ ကျွန်ုပ်တို့အား အသိပေးမည် ဆိုလျှင် အလွန်ပင် ကျေးဇူးဥပကာရ တင်ရှိမည် ဖြစ်သည်။

ဤစီမံကိန်းတွင် ကျွန်ုပ်တို့အား အလွန်တရာ အထောက်အကူပေးခဲ့မှုများအတွက် အသိအမှတ်ပြု ကျေးဇူးတင်ထိုက်သူများ ရှိနေပါသည်။ ပထမဆုံးနှင့် အရေးကြီးဆုံးအားဖြင့်ဆိုလျှင် ရန်ကုန်တက္ကသိုလ် နှင့် ရန်ကုန်အရှေ့ပိုင်းတက္ကသိုလ်ရှိ ဥပဒေကျောင်းများမှ ဝန်ထမ်းများပင် ဖြစ်သည်။ ကျွန်ုပ်တို့ တစ်ဦးချင်းစီသည် ယင်းတက္ကသိုလ်များတွင် ဟောပြောပို့ချမှုများနှင့် အတန်းများတွင် သင်ကြားရန် အခွင့်အရေး ရရှိခဲ့သည့်အပြင် ဤဥပဒေကျောင်းများရှိ ကျွန်ုပ်တို့၏ လုပ်ဖော်ကိုင်ဖက်များ၏ နွေးထွေးသည့် လက်ခံကြိုဆိုမှုအပေါ်လည်း အံ့ဩဝမ်းသာရပါသည်။ ကျွန်ုပ်တို့၏ အတန်းများကို တက်ရောက်ခဲ့သည့် ကျောင်းသားများနှင့် အခြားပုဂ္ဂိုလ်များကိုလည်း ကျေးဇူးတင်ရှိပါသည်။ ယင်းသို့ တက်ရောက်ကြခြင်းသည် ကျွန်ုပ်တို့အတွက် ဂုဏ်ပြုခံရမှုပင် ဖြစ်ပါသည်။

ဆက်လက်၍ ကျေးဇူးတင်ရမည့်သူများမှာ ကျွန်ုပ်တို့နှင့် စကားပြောဆိုခဲ့ပြီး ကျွန်ုပ်တို့၏ မေးခွန်းများကို ဖြေဆိုပေးခဲ့ကြသည့် မြန်မာနိုင်ငံရှိ ရာထူးလုပ်ငန်းအဆင့်ဆင့်မှ ရှေ့နေများပင် ဖြစ်သည်။ လက်တွေ့တွင် ပဋိညာဉ်ဥပဒေကိုအသုံးပြုကာ မည်သို့ စာချုပ် ရေးဆွဲသည် နှင့် တရားစွဲသည်တို့ကို ကျွန်ုပ်တို့ စူးစမ်း လေ့လာခဲ့ပြီး မိမိတို့၏ အချိန်နှင့် ထင်မြင်ယူဆချက်များ ပေးခဲ့ကြသူအားလုံးကို ကျွန်ုပ်တို့ဘက်မှ ကျေးဇူး တင်ရှိပါသည်။

ဤစာအုပ်ရေးသားပြုစုရန်အတွက် မြန်မာပြည်တွင်းမှ ပုဂ္ဂိုလ်အများအပြားသည် (အားလုံး မဟုတ်သော်လည်း အများစုအားဖြင့် ရှေ့နေများသည်) ကျွန်ုပ်တို့အား အားပေးခဲ့ကြပါသည်။ ၎င်းတို့၏ နာမည်များကို ဤနေရာတွင် ဖော်ပြမထားသော်လည်း မည်သူမည်ဝါဖြစ်သည်ကို ကာယကံရှင်များ သိရှိကြပါလိမ့်မည်။ ကျွန်ုပ်တို့၏ ကြိုးပမ်းအားထုတ်မှုများသည် ၎င်းတို့အား အထောက်အကူဖြစ်ခဲ့သည်ဟု ၎င်းတို့ ထင်မြင်ယူဆရန် ကျွန်ုပ်တို့ မျှော်လင့်ပါသည်ဟုသာ ကျွန်ုပ်တို့ ပြောဆိုလိုပါသည်။

ဤစာအုပ်ဖြစ်မြောက်ရေးအတွက် အောက်စဖို့ဒ်တက္ကသိုလ် ဥပဒေဌာန၏ မြန်မာနိုင်ငံဆိုင်ရာ ဥပဒေ အစီအစဉ်၏ အစိတ်အပိုင်းတစ်ရပ်အဖြစ် လုပ်ဆောင်ခဲ့ခြင်း ဖြစ်သည်။ ကျွန်ုပ်တို့သည် ဤအစီအစဉ်ကို ကူညီ ထောက်ပံ့ခဲ့ကြသူများ၊ အထူးသဖြင့် Allen & Overy မှ ဆိုင်မွန် မက္ကင်ဆန်၏ အားပေးကူညီမှုနှင့် ဤစီမံကိန်းအပေါ် ရက်ရောစွာ ကူညီထောက်ပံ့မှုအတွက် ကျေးဇူးတင်ရှိပါသည်။ နိဒါန်းနှင့် အဖွင့်စာမျက်နှာများအတွက် မြန်မာဘာသာသို့ ပြန်ဆိုရာတွင် အကူအညီပေးခဲ့သည် A&O မှ ဂျော့ရှ်ထက်အားလည်း ကျေးဇူးအထူးတင်ရှိပါသည်။ အထူး ကျေးဇူး တင်ထိုက်သူများတွင် ကျွန်ုပ်တို့၏ လက်ထောက်သုတေသီ ခရစ်ရှ်နာပရာဆက် ကီရက်ကက်ဗယ်လာပေးလ်၏ စွမ်းစွမ်းတမံ ဆောင်ရွက်ချက်၊ အထူးသဖြင့် နောက်ဆက်တွဲ ၁ တွင် ဖော်ပြထားသည့် ၁၈၂၂ ခုနှစ် ပဋိညာဉ်အက်ဥပဒေ၏ သမိုင်းကြောင်းနှင့်ပတ်သက်ပြီး ပထမမူကြမ်းကို ၎င်းက ရေးသားပြုစုပေးခဲ့ပါသည်။ AsianLii က အွန်လိုင်းတွင် တင်ထားသည့် အသုံးဝင်သော ဥပဒေအစီရင်ခံစာအတွဲ အများအပြား၏ အကူအညီကို မရရှိခင်က ၎င်းသည် ဥပဒေအစီရင်ခံစာများအပေါ် ပထမဆုံး ရှာဖွေစူးစမ်းမှုကို ပြုလုပ်ပေးခဲ့ပါသည်။ ယင်းကဲ့သို့ အစပြုမှု မရှိဘဲ ကျွန်ုပ်တို့၏ ကျွန်ုပ်လုပ်ငန်းများ ဆက်လုပ်ဆောင်ရွက်မှာ မဖြစ်နိုင်ပါ။ အောက်စဖို့ဒ်တက္ကသိုလ်ပုံနှိပ်တိုက်သည် မေတ္တာရှေ့ထား၍ အဖုံးမာဖြင့် စာအုပ် ထုတ်ပေးခဲ့သည့်အပြင် ဤစာအုပ်ကို အီလက်ထရောနစ်ပုံစံဖြင့် အင်တာနက်တွင် ကျွန်ုပ်တို့ တင်ထားနိုင်စေရန်အတွက်လည်း လုပ်ဆောင်ပေးခဲ့သည်။ အောက်စဖို့ဒ်တက္ကသိုလ် ပုံနှိပ်တိုက်မှ အထူးအားဖြင့် အဲလက်စ် ဖလက်ချ် နှင့် နတ်တလီး ပက်တီတို့ကို ကျေးဇူးတင်ပါသည်။

မြန်မာနိုင်ငံနှင့်ပတ်သက်သည့် မြန်မာနိုင်ငံရှိ ကျွန်ုပ်တို့၏ လုပ်ငန်းသည် အလွန် အကျိုးကျေးဇူးများခဲ့သည်ကို တွေ့ရပါသည်။ ဥပဒေကျောင်းများသို့ သွားရောက် လည်ပတ်မှုများသည် စိတ်မကောင်းစွာပင် အချိန်ကာလ တိုတောင်းသော်လည်း အလွန်အမင်း ဝမ်းမြောက်ရသည့် အချိန်များပင် ဖြစ်သည်။ ပဋိညာဉ်အက်ဥပဒေကို ရှာဖွေစူးစမ်းနိုင်ရန်၊ အခြေအနေမှန်အပေါ် ထင်ဟပ်နိုင်မှု ရှိစေရန် နှင့် ယင်းဥပဒေကတစ်ဆင့် ပိုမိုကျယ်ပြန့်သည့် အင်္ဂလိပ်ဥပဒေအခြေခံ ပဋိညာဉ်ဥပဒေနှင့်ပတ်သက်ပြီး မည်သို့ ဆက်စပ်ပြောပြနိုင်မည်ကို ကျွန်ုပ်တို့ စဉ်းစားနိုင်ရန် အခွင့်အလမ်းတစ်ရပ်ဖြစ်ပြီး ယင်းအခွင့်အလမ်းကို ယခုမှပင် ကျွန်ုပ်တို့ မြင်တွေ့ခဲ့ရသည်ဟု ဆိုနိုင်ပါသည်။ ကျွန်ုပ်တို့သည် ယခင်က မလုပ်ခဲ့ဖူးသေးသည့်၊ ယခင်က မမျှော်လင့်နိုင်ခဲ့သည့် အကျိုးကျေးဇူးများ အတူတကွလုပ်ဆောင်ခြင်းဖြင့် ရရှိခဲ့ပါသည်။

ကျွန်ုပ်တို့သည် ဤဥပဒေပါအချက်အလက်များကို ကြည့်ရှုထားပြီး ကျွန်ုပ်တို့၏ မတူညီသည့် (သို့သော် ဖြည့်စွက်ပေးနိုင်မည်ဟု မျှော်လင့်ရသည့်) အမြင်များကို တင်ပြထားပြီး ကောက်ချက်ချ သဘာတူနိုင်အောင်ထိ ရောက်ရှိခဲ့သည့် လုပ်ငန်းစဉ်သည် စိတ်အားတက်ဖွယ်ပင် ဖြစ်သည်။ အန်ဒရူး ဘားရိုးစ်က ရှင်းရှင်းလင်းလင်း ပြောထားချင်သည်မှာ အေဒီယန် ဘရစ်ဂ်စ် သည် ဤလေ့လာရေးသားမှု၏ အစိတ်အပိုင်းအများစုကို ပြုလုပ်ခဲ့ပြီး ပထမစာမူကြမ်းကိုလည်း ရေးသားပြုစုခဲ့ပြီး ထို့နောက်တွင်မှ ကျန်သည့်အပိုင်းများကို နှစ်ဦး ပူးပေါင်းပြီး ရေးသားပြုစုခဲ့ခြင်း ဖြစ်သည်။ ဤလုပ်ငန်းစဉ်တစ်ခုလုံးသည် ပျော်ရွှင်ဖွယ်ကောင်းပြီး ပညာရပ်ပိုင်းအားဖြင့်

အကျိုးကျေးဇူးများသည် စီမံကိန်းတစ်ခု ဖြစ်ခဲ့သည့်အတွက် ကျွန်ုပ်တို့နှစ်ဦး တစ်ဦးအပေါ်တစ်ဦး ကျေးဇူးတင်သည့်အပြင် မြန်မာနိုင်ငံအပေါ်ကျေးဇူးတင်ရှိပါသည်။

ဤစာအုပ်ကို ဒုတိယအကြိမ်ထုတ်ဝေရန် သင့်တော်သည့်ကာလတစ်ခုတွင် လိုကောင်း လိုလာနိုင်ပါသည်။ ဤစာအုပ်ပါ အချက်အလက် စာသားများနှင့်ပတ်သက်ပြီး အမှားတစ်စုံတစ်ရာ တွေ့ရှိပါက၊ သို့မဟုတ် ကျွန်ုပ်တို့ မသိရှိလိုက်သည့် အရာများအပေါ် အသိပေးရန် ဆန္ဒရှိပါက ကျေးဇူးပြု၍ ဆက်သွယ်ရန် ဖိတ်ခေါ်ပါသည်။ ကျွန်ုပ်တို့ကို ဆက်သွယ်နိုင်မည့် အလွယ်ကူဆုံးနည်းလမ်းမှာ adrian.briggs@law.ox.ac.uk နှင့် andrew.burrows@law.ox.ac.uk အီးမေးလ်များဆီသို့ ဆက်သွယ်နိုင်ပါသည်။ သို့မဟုတ် လူကိုယ်တိုင် တွေ့ဆုံလိုပါက ကျွန်ုပ်တို့ နောက်တစ်ကြိမ် မြန်မာပြည် လာရောက်သည့်အခါ တွေ့ဆုံနိုင်ပါသည်။

AB နှင့် AB

အောက်စဖို့ဒ်၊ ဒီဇင်ဘာ ၁၊ ၂၀၁၆

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1

Introduction to the Law of Contract in Myanmar

The purpose of this book is to identify, state, and explain the law of contract in Myanmar and to look forward to some of the questions which may arise and call for attention in the years ahead.

Every book needs an introduction which states its purpose, and the approach that has been taken to achieve that purpose, so that the reader knows what to expect. This book seeks to achieve its purpose by reference to the statutes on contract of Burma and Myanmar, and to the decisions on contract of the judiciary in Burma and Myanmar which are available in the English language. It suggests how any gaps which appear to remain may be filled in with the assistance of well-established general common law principle because Myanmar is still a common law jurisdiction, and the techniques of its law and lawyers are the techniques of the common law. In other words, in filling in any gaps it may be helpful to turn for assistance to the shared experience of other common law jurisdictions (including the laws of England and Wales with which we are particularly familiar).

1.1 The sources of Myanmar contract law

The source material from which this statement of the law is made is almost exclusively local to Burma or Myanmar (according to the date of its creation). The obvious point of departure is the Contract Act 1872, which even as it approaches its 150th anniversary, is a remarkably robust and lucid statement of the law. It is not perfect, of course. It probably was not perfect when it was made, and the way people make contracts today is not exactly the same as it was in 1872. It is perhaps unsurprising that there are some points on which law reform bodies could make useful improvements, but the marvel is that there are rather few of them. It is true that the advance of technology, the changing ways in which business is done, and the things that people contract about, all prompt the question whether, if it were to be drafted today, a Contract Act 2022 would look like the one made in 1872: the answer to that question is not easy to give. But for now, and for the foreseeable future, the 1872 Act is and will remain the foundation of Myanmar contract law; and this book is organised on that basis.

After the 1872 Act itself, and some more specific Acts, such as the Specific Relief Act 1877, the next most important source are the decisions of courts in Burma, and then in Myanmar, since 1872. For a long time reports of these decisions were not

easy for Myanmar lawyers to find, as the printed series of law reports were not obviously accessible; and they were almost entirely written in the English language. It appears that the most commonly used source of judicial decisions on the law of contract was not the *verbatim* judgments handed down by the courts of the country, but certain well-known Digests of cases, of very considerable age. However, in 2016 the principal series of law reports, along with the Burma Code, and certain other materials, were copied and made freely available in electronic form on the AsianLII website (www.asianlii.org). As the most recent judgments, in the Myanmar language, are published on the website of the Union Supreme Court, this means that if one knows how to look for it, the judicial authorities on the law of contract in Myanmar are accessible, in their original form, to anyone with an internet connection. This makes it possible to investigate and state the law of contract, as far as possible, by using exclusively Myanmar material, but shaped by common law technique.

From time to time it has been asked whether these authorities, in which the judgments of the courts of colonial Burma play a significant part, are reliable as a source of current law. From within the country there have been occasional suggestions that the decisions of courts from an earlier time are not necessarily helpful in a country whose government was seeking to steer or drive society in a new direction.¹ From outside the country there have been other suggestions, that the post-independence history of Burma, then of Myanmar, has transformed the law and legal culture, several times over, and that unless all this is properly understood one cannot hope to understand the law of Myanmar.² There is certainly also a view, heard inside the country and not rarely, that it does not matter what a contract, or the law, actually says, because power is more important than law. And there have certainly been problems in the administration of justice, not least because of the shortage of resources allocated to the adjudication of disputes in accordance with the law.

And yet if one asks lawyers in Myanmar whether their contract law is contained in the Contract Act, the answer one always receives is that it is; and if one asks those same lawyers whether the law is expounded by the judges, the answer is just the same: the law is what the judges have said it is. It is unrealistic to suppose that the only authentic decisions on the contract law of Myanmar are those handed down by the courts in the years since 2008, or whichever date is chosen: that would simply mean that a book of the law of contract would be mostly blank where business and ordinary people alike need information and guidance. The basis on which this book is written is that the decisions of the courts of Myanmar on the interpretation of the Contract Act (or more rarely, where there is no statutory provision) are the best

¹ Dr Maung Maung, then Minister for Judicial Affairs, wrote that 'since the circumstances vary from case to case depending on social and historical factors reliance on previous rulings which were from different times should not be made. Foreign rulings should not be cited at all' (Foreword to the Courts Manual (Chief Court Press, Rangoon, 1973)).

² An interesting analysis of whether Myanmar in 2006 could still be considered as a common law system was published by J Southalan: <http://www.thailawforum.com/articles/john-southalan.html> (also at (2006) 25 Legal Journal on Burma 1; http://www.ibiblio.org/obl/docs4/LIOB_25.pdf). The irony, given that in 2006 one might have taken the view that Myanmar had decided to depart in several respects from key tenets of the common law, is that ten years later the very opposite appears to be true.

evidence of what the law of contract in Myanmar actually is. The decisions of judges, especially those given in the years after independence, are a remarkable treasury of legal analysis. They show that the courts of Myanmar were capable of powerful analysis and effective reasoning. If anyone today wishes to see what good and clear legal writing looks like, the decisions of the courts from 1948 to 1969 are a very good place to start looking; after that date the judgments are fewer in number and none in the English language, so it is not possible for us to assess them here.

Among Myanmar lawyers there appears to be a hesitation about placing reliance on textbooks, even those compiled in earlier times by those who were masters of the subject. However, it is a challenging task to understand the law without the aid of a book to explain where it is to be found and what it means; and even if the writings of those who have read and thought about this material are not a formal source of law in Myanmar, their work in helping Myanmar lawyers discover or rediscover their law makes its own contribution.

This book is written for those who are teaching and learning the law or want to know what the law of contract is because they are citizens of Myanmar (or foreign individuals or companies) conducting business in Myanmar. It places original material from Burma and Myanmar at its heart, but also uses the general doctrines of contract from other common law jurisdictions to supplement and to fill in gaps where these appear to need filling. There are some remarkable cases in which judges in Myanmar, finding nothing in the Contract Act to provide an answer to the question before them, relied on general common law principles to dispose of a case. It is for this reason that one needs to remember that Myanmar never stopped being a common law system, and that the Contract Act never claimed to be a complete statement of the law of contract in Myanmar. It should be possible to teach and learn the law of contract without needing to study the footnotes set out in this book, but the footnotes indicate where the law is actually to be found, and also offer some further analysis in aid of the main text.

1.2 Ten general points about the law of contract

It is convenient at the beginning of a textbook account, to deal with a number of general points. Some will come up again later, some others may be thought to be of marginal importance, and a couple are really so obvious that they go without saying. But every experienced lawyer knows that the things which he found most difficult were the things which nobody told him. It is therefore convenient to mention at the outset a number of points which paint the background against which any study of the law of contract, and of the decisions of the judges, will take place. There are ten of them.

(i) Contracts are made to be kept

First, and most important of all, is the principle that agreements must be kept. The principle is ancient, and in the West is rendered in Latin as *pacta sunt servanda*. It is

as true for international treaties as it is for the large and complex contracts made in international finance and commerce as it is for the contracts which people make in their daily lives. It is very hard to find a person, still less a lawyer, in Myanmar who would disagree. It follows that, once a court has come to the conclusion that there was a contract, the only thing which remains for it to do is to determine what it required the parties to do, to assess whether they did it, and to decree the consequences if one or the other of them failed to perform the promises of their agreement. An individual who has failed, without lawful excuse, to perform his or her contractual promises will expect to lose the case; a company which has failed, without lawful excuse, to perform its contractual promises will expect to lose the case.

Of course, the principle that agreements must be kept does not necessarily mean that a defendant will be ordered by a court to do what he, she, or it promised to perform: the law recognises that the best response to a breach of contract is a judgment that there be compensation for loss: a transfer of money is frequently better, tidier, and more efficient than any attempt to force a party to do, several months after he should have done it, what he has failed to do. No doubt the calculation, of how much compensation there should be, can be complex. It is unlikely that a plaintiff will ever recover so much compensation that she can truthfully say that she is in no worse a financial position than she would have been in if the contract had been performed. As we will see in Chapter 8, the law strikes a balance, the effect of which is that contracts are made, and meant, to be performed, but the enforcement of the contract may be a little less extensive than one might suppose.

(ii) All contracts are agreements, but not all agreements are contracts

As we shall see in Chapter 2, the essence of a contract is that it is an agreement supported by what the law calls ‘consideration’ (which, as we shall see, essentially means that something must be given in return for the other party’s promise). The structure of the Contract Act is that the court must first find an agreement, and then find consideration.

But there are some agreements which are not contracts. Those which are formed but without consideration, which we may term ‘gratuitous’, are not contractual; although they may bind the parties as a matter of honour or social obligation, the courts cannot enforce them. So also with an agreement made between two people who intend to agree with each other, but who do not intend to create the kind of agreement over which a court would have control: an agreement to help out a friend at the weekend in return for a meal may well be an agreement supported by consideration, but it will not be one which the courts will enforce. An agreement made with a minor child will not be one which the courts will enforce; and most obviously of all, an agreement to do something illegal, such as to steal property or injure a person, may be an agreement, but is certainly not one which may take effect as a contract: we look at all this in Chapter 3. We therefore need to take care to use the term ‘agreement’ to refer to a consensus, a meeting of minds, but which will not necessarily be enforced by a court, and the term ‘contract’ to mean an agreement

which complies with those additional requirements which the law specifies as needed to elevate an agreement to the status of contract.

The close relationship between agreements and contracts means that the law must have a mechanism for dealing with those cases in which there was agreement, but that agreement was entered into on a basis which is open to objection. This may be seen where the agreement was brought into being by pressure, or trickery, or misleading conduct, or mistake. In such cases there is an agreement – an agreement obtained by fraud is still an agreement, after all – and, if it is supported by consideration, it may take effect as a contract. But the party whose agreement was obtained by such means may be able to release himself from the contract on the basis that there was something wrong with the agreement. In Chapter 4 we examine the phenomenon of the ‘voidable’ contract: the contract which stands on the basis of an agreement which had a flaw in it, and which may therefore be reversed because of the flaw in the agreement.

(iii) All contracts create obligations, but not all obligations are created by contracts

An obligation is a legal tie, by which a person is bound to another, and which requires him to pay or to act in a particular way in relation to that other, and which allows that other to enforce the content of the obligation. We see this most easily in the case of the contract, in which two or more parties create a relationship which was not there before and which, if the conditions specified by law are met, obliges each to perform the promises or the acts which were undertaken. In many countries of the common law world, this would be taken to mean that only the parties to the obligation – the parties who have created the tie by which each is bound to the other – would be entitled to claim rights created by that obligation, from which it would follow that only a party to the contractual obligation could enforce the promises contained in the obligation. Myanmar law, however, has taken a rather distinctive view on this last point. For though the obligation ties the parties who created it to each other, where the obligation which they create was intended to confer a benefit on a third party – a person not involved in the creation of the obligation – the third party may be allowed to enforce the contract, even though not a party to the obligation. We examine this in Chapter 5 but it means that, although the contract contains promises made between the contracting parties, which means that they are tied, obliged to each other, the rights created by this obligation may be claimed by someone else.

There are obligations in private law which are not created by contracts. The largest and most important category is obligations laid down by torts. These are obligations which arise because the law says, in the circumstances, that they do. The civil law says that you must not convert the property of others to your own use, or assault another, or trespass on another’s land, or defame another (the fact that the criminal law may say so as well, and may impose measures by way of punishment, is a separate point, irrelevant to our examination of the private law relationship). The civil law in Myanmar probably also says that you must not by carelessness injure your neighbour

or harm his property: this is the tort of negligence. All these are obligations within the law of tort: they are obligations imposed by law rather than created by the agreement of parties.

And then there are obligations which arise because a benefit has been conferred on another by, for example, mistake of one kind or another. In much of the common law world, the way these cases are dealt with is by application of the principle that the law should reverse the unjust enrichment which would be the result if nothing were done. But Myanmar law primarily deals with such cases according to a more archaic principle, which is in most countries now regarded as a fiction: that there are relationships between parties which resemble contracts, and which mean that the court may require a payment to be made as if there were a contract. We touch on these in several chapters, but we focus in particular on this general species of obligation in Chapter 10.

(iv) Breach of contract is not an offence under the Penal Code, though a person who makes a promise which he does not intend to perform may be guilty of cheating

One possible reason why the courts in Myanmar appear to hear relatively few civil cases of breach of contract is that a party may prefer to instigate criminal proceedings for cheating, contrary to Sections 415 and 420 of the Penal Code. It is not a crime to breach a contract; the failure to perform a contract is not a penal matter. But in certain circumstances a person who makes a contract with another – especially a voidable contract where the consent of the other is caused by fraud – may commit an offence of cheating.

The two sections of the Penal Code are Sections 415 and 420, which state that:

415. Cheating. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat’.

Explanation: A dishonest concealment of facts is a deception within the meaning of the Section.

420. Cheating and dishonestly inducing delivery of property. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to a fine.

A person who makes a contract which he has no intention to perform, but which the other does perform, commits cheating. Although Section 415 explains that a dishonest concealment of facts may be a deception, the intention of a person not to perform a contract which he is about to make with another is a fact: the state of his mind is as much a fact as is the state of his health.

It follows that, if I trick someone into making a contract with me and, as a result of my deception they hand over money or other property to me, I may commit an offence under Section 420 of the Penal Code. It is necessary, for the commission of the offence, for the deception to be committed at the beginning, when the contract is made. A person who makes a contract, which he intends to perform but then finds that he is unable to perform, does not commit the offence: an intention to cheat formed after the contract was made does not normally give rise to penal consequences.³ In other words, the cheating must be committed at the very inception; it is not cheating to fail to perform, or to receive property under, a contract which was not voidable at the outset.

This book is concerned with the civil law of contract, and we will not therefore deal with questions of criminal liability under the Penal Code. It is, however, important to understand that civil liability and criminal liability are separate and distinct, and that the presence of one does not exclude the possibility of the other.

(v) Courts enforce the contracts which people make, not the contracts which reasonable people might have made

The freedom to make a contract, within the framework of the Contract Act and the general law, is sometimes described as contractual ‘autonomy’. That is to say, the parties decide for themselves who they bind themselves to or contract with, and the terms on which they are prepared to agree and become bound to each other. Unless the Contract Act provides a reason why the agreement must be,⁴ or may be,⁵ prevented from taking effect, the agreement will be binding on the parties and will be enforced by the court.⁶

It is possible that when the court ascertains the terms of the contract, and interprets them to find the meaning which the law gives to them, the court will be surprised; it may also be that one of the parties will admit that this is the contract which she made but will also say that it is not the contract which she intended to make, or would have made if she had known then what she knows now. None of this is relevant and, in principle at least, the law requires the court to ignore it. If, for example, a manufacturer promises to deliver a specified number of items which he is to produce in his factory or workshop, but finds that he is unable to do so because he is taken ill, or a key employee leaves him, he will be in breach of his contract if he fails to perform what he had promised to perform. If that is so, the promisee will, in principle at least, be entitled to compensation for loss caused to him by the breach. If the promisor objects, saying that he tried his best to perform his promise, the answer is that the promise he gave was not a promise to try, or to use his best efforts, to manufacture the goods; he promised to manufacture, to do, to succeed. If he had wanted to make

³ See *U Way Lin v F Mohamed* (1965) BLR 1054 (CC).

⁴ For example, because it is an agreement to perform an act which is illegal or contrary to public policy: see Chapter 3.6.

⁵ For example, because the consent of the promisor was caused by coercion, fraud, misrepresentation or mistake, which means that the promisor has an option to rescind the contract: see Chapter 4.

⁶ For example, *S Haque v N Ahmed* (1950) BLR 185 (SC) at 192.

a contract which meant that if he used his best efforts, but failed, this would amount to performance of the promise, then it was up to him to agree on those terms with the customer, and if agreement could not be reached, to refuse to agree. Parties are bound by the contracts which they make; and the courts will enforce a contract which was made but which has not been wholly and precisely performed. It means that the parties have significant power, but they bear the responsibility for being sure that the contract which they make really is the one they wished to make.

A particular example of this principle can be seen when a passenger makes a contract on the basis of a written document issued by the transport company which says, in readable form, that the transport company will not be liable to the passenger if something unwelcome happens, even if its negligence results in the death of the passenger.⁷ The parties are free to make their own contract, in effect to make their own private law. In the opinion of the court, that principle was of general effect, and the carrier remained free to limit or even exempt itself from liability by terms of the contract 'however amazing they appear to be'.⁸

(vi) One of the most important issues in practical contract law is not regulated by the Contract Act

The Contract Act provides the rules by which it is decided whether a contract was formed, who has to perform (and how), and what happens if a promisor does not perform his promise. But it gives no guidance on how a court – or lawyers giving legal advice – should go about ascertaining the true and precise meaning of the promises made in the contract. The law reports of decided cases can be used to illustrate how it is that many of the provisions of the Contract Act work, but the question of construction or interpretation of the terms of the contract is not answered by the Act. This is surprising.

Suppose I make a contract with a mechanic that he will repair my car, which has developed an intermittent fault in its steering system. Suppose the work is done, but that a week later, while I am driving along a busy highway, the steering fails and I am involved in an accident. If I sue the mechanic for breach of contract, do I have a good claim against him? The answer will depend on what the law says he promised to do: did he promise to put the steering right, or did he promise to use reasonable skill and care to put the steering right? Suppose the mechanic used all his skill, and tested the car after he had worked on it, but did not detect the fault which, because it was intermittent rather than constant, did not reveal itself. If on a true construction of the promise made by the mechanic he promised to use reasonable skill and care to repair the car, it seems that he has performed his promise, has done what he promised to do; and if that is so, he has no liability to me. On the other hand, if on a true construction of the mechanic's promise he promised to correct the fault, he has not

⁷ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC).

⁸ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC), at 304. In this respect the Chief Court followed its understanding of the English common law as it stood at the time. Whether it would come to the same conclusion today is dealt with in more detail in Chapter 5.8, and the question of law reform on this point in Chapter 12.5.

performed the promise he made, and is in principle liable to me for the loss and damage resulting from the breach, unless the correction of the fault is impossible, in which case the contract is, and always was, void.⁹ So which did the mechanic promise? How do we decide which of these possible interpretations is the correct one?

The answer to this question is not given by the Contract Act: the Act says nothing about the way a court is to conduct the search for the precise meaning of promises which the parties have made. Yet it is a task which arises every day, for in very many cases the parties to litigation do not argue about whether a contract was formed, and do not argue about what actually happened. Where they do disagree is on the question of what, exactly, each party promised to do, and what those promises actually mean. As soon as we know that, we can apply the law on performance and on non-performance; but we can do this only once we have decided what 'performance' was promised to the promisee.

At several points in this book, and especially in Chapter 5, we will return to this broad question. In some circumstances the question may not be difficult to answer, but in many cases the judge will have to answer this question. A mixture of common sense and reasonable expectation will contribute to the answer, but the main point is this: we need to decide what the terms of the contract mean before we can address what performance of the contract would require. And the Act does not help us with it. The next two general points may, though.

(vii) The importance of the objective principle

The common law deals with what it can see or hear. It assumes that people say what they mean, and that they mean what they say. It judges the message conveyed by language, whether this is verbal language, body language, gestures or any other form of communication, by asking what the person receiving the message would reasonably take it to mean. The common law takes the view that a person to whom a message is conveyed is entitled to assume that the person meant what she appeared to say. When, for example, in an auction a bidder raises her hand and bids for a particular item, it is assumed that she intends to bid for that particular item. That is the conclusion the auctioneer would arrive at when he accepts the bid by the fall of his hammer. If, when the auction is concluded, the bidder were to say that she had intended to bid for a different item, and had misheard the auctioneer, it will make no difference. Even if it is completely true, so that it may be said that the auctioneer intended to sell one item while the bidder intended to bid for a different one, and so that it may also be said that they did not actually agree on the thing to be bought and sold, there will still be an agreement; and there will still be a contract unless one of the points which we will consider in Chapter 4 is applicable on the facts of the case.

⁹ Contract Act, s 56 (see further below, Chapter 3.4). The correction of the fault may be considered to be impossible if it results from a flaw in the design of the car and the manufacturers, though they are aware of this, refuse to admit it or release any information which would allow a mechanic to see what needs to be done.

The position may be different where the person to whom the message is addressed knows that the person speaking is confused or has made a mistake: if the seller offers to sell me something for \$100 when it would be obvious to anybody that he must have meant to say \$1000, I probably cannot accept his proposal to sell for \$100. It is all the more obvious where the person to whom the message is addressed has himself caused the mistake which the other party has made. But it would be hopeless if the law were to allow a person who appears to have said one thing perfectly clearly, and which I took at face value, to say that he actually meant something quite different. If a person offers or proposes to sell something for 10,000 kyat, and when I communicate my acceptance of this proposal, thinking I have obtained a good deal, he responds by saying he meant to say 20,000 kyat, he is already bound to sell for 10,000 kyat. Otherwise every seller who decides that he might have asked for a higher price would be free to say to the court that his true intention was not accurately represented by the words he spoke; and the law might quickly descend into chaos. The common law does not allow this kind of thing.

It follows that when writers describe, as they sometimes do, a contract as being formed from 'a meeting of minds', this is meant in a rather particular sense. For the common law is not usually concerned with what *was* in the mind, rather, with what *appeared to be* in the mind, of the party with whom it is concerned. This attention to the objective, or outward, appearance of the intentions of parties allows a court to ensure that the law of contract is predictable and reliable.¹⁰

(viii) Contracts do not need to be written, but the courts enforce written contracts according to the writing

Though there are some specific kinds of contract which are required by statutes other than the Contract Act to be made in writing, and though Section 10 of the Contract Act confirms the rather obvious point that if other legislation requires a contract to be made in writing, or to be witnessed, or a registration to take place, that legislation continues to bind the parties and operate on the contract, contracts do not generally need to be made in writing. It is surprising how frequently people will say that there was no contract because nothing was written down. It is almost always wrong: almost, but not invariably, always wrong, because if the very terms on which the parties agree are that there is to be no binding contract between them until their agreement is committed to writing, then there is no contract until the specified writing is produced.¹¹ But the law does not generally require contracts to be made in writing.

However, where the parties to a contract have reduced their agreement to written form, the court will be very likely to treat the written record as a conclusive statement of the intentions of the parties.¹² The Evidence Act 1872 places significant – and

¹⁰ See *Daw Daw Thi v U Thein Maung & Co Ltd* (1956) BLR 14 (HC) at 19-20 (assessment of whether landlord was in good faith assessed on basis of external appearance, not on the assertion of his actual state of mind).

¹¹ For example, *The State Agricultural Marketing Board v Aung Trading Co* (1966) BLR 252 (CC).

¹² For example, *The Mineral Resources Development Corp v U Ba Yone* (1965) BLR 856 (CC).

rather complex – restrictions on the ability of the parties to use oral evidence to alter the effect of the written terms. All common law systems contain rules which inhibit parties who would seek to persuade a court that the written record of their contract is not the contract between them. There may be several reasons for this, but one important one will be that the law encourages contracting parties to agree in writing. It would undermine this policy to allow a court to treat the written record of the contract as though it were just another piece of evidence.

But parties may make a mistake in the writing down of the terms of their agreement. The law therefore allows written documents to be corrected, or ‘rectified’, if it is satisfied that the parties’ written record of their agreement is inaccurate: that is to say, that they made an agreement on particular terms, but what they wrote down did not correspond to the agreement they had actually made. The Specific Relief Act 1877 provides the mechanism but, although the principle, and the remedy, is well established, it fits awkwardly within a broader set of provisions in the Evidence Act 1872 which are designed to prevent the written record of a contract being overridden or undermined.

(ix) The Contract Act 1872 is not the whole of the law of contract: specific statutes may override (or add to) its general provisions, and common law principles may supplement it

The Contract Act is the foundation for all contracts under the law of Myanmar: it is the general law. It was drafted almost 150 years ago, and those who worked on the text did so in England and in India. It was an extraordinary piece of drafting, but it would have been quite remarkable if it had been completely perfect. The truth is, however, that in one or two places the Act does not appear to be wholly consistent with itself: where this conclusion cannot be avoided we have pointed out the problem. In some other respects, the Act may appear to have left a gap which needs to be filled in: where this is so we have pointed it out and have suggested what should be done. The Contract Act 1872 is the engine of commerce, and as is the case with all engines, from time to time it needs minor repairs.

The Contract Act may, in certain cases, be displaced or overridden by special legislation,¹³ for special provisions in statutes override general ones.¹⁴ For example, the Contract Act allows the parties to a contract to agree on the terms which they wish. But in certain cases, other legislation may supervene to give a different answer. Suppose, for example, in a contract of employment the employer and employee agree upon a daily wage at a rather low level. If the government legislates to fix the minimum wage above this figure, the new legislation will override the figure which had been agreed, and on this point the Contract Act will not provide the answer to

¹³ For example, a claim against a common carrier sued as such is not governed by the Contract Act but by the Carriers Act 1865: see for example *The State Agricultural Marketing Board, Aykab v The Arakan Carriers' Syndicate, Aykab* (1958) BLR 138 (HC).

¹⁴ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC), at 291. See for illustration the way in which the Urban Rent Control Act 1948 overrode the normal rights and incidents of a lease: *Mrs Constance Minoos Writer v AM Khan* (1951) BLR 169 (SC).

the question of what the employee is entitled to be paid under the contract of employment. This happened in 2013,¹⁵ and was followed by a decision to impose a minimum wage in certain sectors of the economy in 2015. It is obvious that this prevails over the terms of the contract, and to this extent the Contract Act 1872 is partially set aside by a provision from another statute.

Where the Contract Act appears to be incomplete, it should be remembered that it says, at the beginning, that it is expedient ‘to define and amend certain parts of the law relating to contracts’. The Act does not set out to provide a complete and comprehensive statement of the law of contract. It is on occasion supplemented by rules taken from other statutes,¹⁶ and may on other occasions be supplemented by well-established principles from other common law jurisdictions.¹⁷ And where the Act appears unable to answer a particular question, the Burma Laws Act 1898, Section 13(3), may assist the court:

13. (3) In cases not provided for by...any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

The importance of this provision is underlined by an important judgment of the Chief Court¹⁸ in which the Court had been pressed with the argument that, where the written laws of Myanmar did not make express provision for the relief applied for, there was nothing the court could do. The Court disagreed, saying: ‘where there is neither provision nor prohibition [the Court] has to be guided by ordinary principles of common sense, justice, equity and good conscience’.¹⁹ Following the guidance of the Chief Court we will, in various places, indicate how Section 13(3) may be available to help a court to arrive at a decision which could not otherwise be reached.²⁰ The availability of Section 13(3) means that, if the judges are confident in the exercise of this power, there is considerable scope for the law of contract to be adapted or modernised without the need to wait for legislation.²¹

¹⁵ Minimum Wage Law 2013.

¹⁶ For an obvious example, the Evidence Act 1872.

¹⁷ For example, *Hollandia Pinmen v H Oppenheimer* AIR 1924 Ran 356; *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC).

¹⁸ *Steel Bros & Co Ltd v YA Ganny Sons* (1965) BLR 449 (CC). ¹⁹ *Ibid* at 463.

²⁰ Of course, Section 13(3) cannot be used to prevent the application of a statutory rule which does govern the issue before the court: *Mohamed Farooq v Sahib Jan* (1960) BLR 51 (HC) (specific provision of Transfer of Property Act preventing application, by general reference to Section 13(3), of a principle of Mohamedan law as to mode of making gifts.)

²¹ For example, in *The Government of the Union of Burma v GC Mangapathy* (1949) BLR 234 (HC) the court applied Contract Act s 152 as a rule of justice, equity and good conscience to a case (duty of care of government which had requisitioned goods) to which it did not apply, because no rule otherwise would have applied. In *China-Siam Line v Nay Yi Yi Stores* (1954) BLR 270 (HC) the court applied the Carriage of Goods by Sea Act 1925 via Section 13(3) to a factual situation to which it did not apply, namely carriage from a port outside Myanmar, as there was no other basis to find a sensible law to apply to determine the issues arising on the claim alleging short delivery. As the legislators had decided not to apply the 1925 Act to shipments from Hong Kong, it was a strikingly bold decision of the court to do so.

There is a separate question, which has arisen in some cases, whether Section 13(3) is really an instruction to the court to apply English common law.²² However, even if this is how it was once understood, the persuasive force of this reasoning must now be much diminished, not only in those areas in which the law of Myanmar appears to have diverged from English law and in which recourse to English law would be to look for a rule which will no longer fit the gap, but also more generally because familiarity with English law on the part of Myanmar judges, advocates and clients appears to be weaker than it once was. The result is that the pragmatic case for using the English common law in a supplementary role is perhaps less strong than in former times. It may also be argued that the common law of England has not had to face up to the acute difficulty facing a populace living under enemy occupation,²³ with the further consequence that it is not always best suited to fill in some of the gaps in Myanmar law.

(x) Practical reason and practical reasoning are almost as important as the statute itself

At various points we will come across a question to which the answer is inevitable, even though the Contract Act does not make it easy to derive that answer. It is important to remember that the purpose of the Contract Act is to allow agreements to be made and business to be done. It would be contrary to the purpose of the Act to use the Act to produce an outcome which is simply unacceptable.²⁴ If, for example, a contract contains a term which appears to mean that, if one party breaches his promise he does not have to pay any compensation even if very significant losses have been caused, or means that if one party has deliberately made an untruthful statement, the other party promises that his consent was not caused by the false statement, then the answer simply has to be that the contract term cannot be allowed to have effect. The task of the lawyer, and in due course of the judge, is to find the justification which will best support this outcome. The task of the lawyer and the judge is not to apply the Act blindly, for sometimes only one conclusion would make sense and would produce acceptable outcomes in the real world.

²² See *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC). One may also see *U Ba Yi v Mahant Singh* AIR 1937 Ran 303; *The Tajmahal Stationery Mart v KE Mohamed Ebrahim VS Aliyar & Co* (1950) BLR 41 (HC); *The Union of Burma v U Htoon Pe* (1958) BLR 50 (HC); *Ko Maung Gale v Ma On Nyunt* (1963) BLR 515 (CC), each of which approve recourse to the English common law to fill gaps in the written laws.

²³ *VERM Krishna Chettiar v MMK Subbiya Chettiar* (1948) BLR 278 (HC), at 295-303 (whether outbreak of war terminates agency).

²⁴ See for example *Maung Po Lun v Ma E Mai* (1947) RLR 149 ('it is the duty of the courts to administer justice taking a broad view and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law'), cited with approval in *U Maung Maung v Daw Thein May* (1950) BLR 151 (SC).

1.3 The organisation of this book

The analysis of the law of contract in this book follows the structure and the logic of the Contract Act.

In Chapter 2 we examine and analyse the rules by which it is decided whether the parties formed an agreement. If they have done, that agreement may take effect as a contract, and the next stage in the analysis will be found in the following Chapter.

If the parties have formed an agreement, the next question is whether that agreement is valid, or is made void from the start by the Contract Act. We examine these grounds for the voidness of an agreement, which would otherwise have been established, in Chapter 3. There are several reasons why the law may treat an agreement, otherwise made, as having no effect in law, or as being void: take, for example, an agreement to pay someone to commit a crime. At this point we also examine the case of a contract which becomes void because of supervening impossibility of performance or supervening illegality of performance.

If the parties have made an agreement which is not void, it will take effect as a contract. However, there may be reasons why one of the parties may argue that his consent to the agreement was not 'free consent', and in Chapter 4 we examine the grounds on which a party may have an option to avoid, or rescind, the contract. Where one party is given this option by the Act the contract is said to be voidable: that is, the contract is valid and effective unless and until the party with the option decides to rescind the contract.

The next task is to ascertain the terms of the contract, and we examine this in Chapter 5. The starting point will of course be the express terms, if there are any, but the law provides for gaps to be filled by implied terms. One will need to interpret the terms to ascertain precisely what they mean, and in order to know precisely what each party has promised to do. If the express terms have been reduced to writing, the Evidence Act 1872 places restrictions on the extent to which non-written terms can contradict the written terms. The essential point of the rules in Chapter 5 is to ascertain the meaning of the promises made in the contract so that the issues of performance and non-performance can be properly assessed. It is here that we also deal with the closely-related question of who is bound by, and who is entitled under, the contract.

In Chapter 6 we examine the rules governing performance. The starting point is to identify, precisely, what is required from the promisor if she is to perform her promise, but also to explain what the other party is required to do to facilitate this. We will examine the rules governing the performance (and conversely, the non-performance) of reciprocal and contingent contracts. We also look at the important issue of the release of a party from all or some of her contractual obligations of performance, and what, precisely, is required to effect a binding release.

In Chapter 7 we embark on our examination of breach of contract. In the first of the three chapters concerned with breach we look at the circumstances in which a party to a contract may put an end to the contract, or rescind it, on account of the other party's breach of contract.

In Chapter 8 we look at the monetary remedies for breach of contract. These divide into two categories. In the first is the suit for the sum agreed to be paid: for example, the price for which the property was to be transferred or the fee for which the service was provided. Here the plaintiff is not seeking compensation for non-performance; he is insisting on performance of the original promise to pay according to its terms. As we shall see, there may be limits placed by the law on the recovery of compensation, but these do not apply to suits for the enforcement of a contractual payment obligation. In the second category are suits for compensation for breach of contract; suits for compensation for the loss or damage caused by the breach.

In Chapter 9 we look at specific performance and injunctions which are discretionary remedies for breach of contract. They are found in the Specific Relief Act 1877 rather than the Contract Act.

Chapter 10 deals broadly with the question of restitution of benefits conferred. This is relevant when there is, for one reason or another, no valid contract between the parties. This situation may come about because the agreement which the parties formed, or thought they had made, was void of legal effect: if some action has been taken on the footing that the agreement was valid, the question is what the court may do to reverse its effect. It may arise when a contract between the parties, which was perfectly valid, becomes void by reason of supervening impossibility or illegality or because it has been put an end to because of the other party's breach: what happens in respect of benefits already conferred? Or the contract may have been voidable because one of the parties did not freely consent and that party has rescinded the contract after benefits have been conferred. And it may happen when one or both of the parties have – to put the point in very general terms – acted as though there was, or might have been, a contract between them when in fact or in law there was not. Furthermore, there are other 'relationships' under which benefits have been conferred outside the context of void agreements, void contracts and voidable contracts. The Contract Act appears to treat the cases examined in this chapter as a series of individual cases for which individual rules are provided. It may however be that one can identify a common thread, which would be particularly useful when a court has to deal with a case which is analogous to, but not obviously within, these individual categories.

Chapter 11 mentions, in summary form, the essential characteristics of five special and particular contracts: sale of goods, indemnity and guarantee, bailment, agency, and partnership. In a book dealing with the general principles of contract law there is little that needs to be said about these particular contracts. Although these contracts all have special features not shared with other contracts (and although contracts for the Sale of Goods, and Partnership, were removed from the Contract Act and placed in separate statutes), they are still derived from the basic model of contract with which the Act is concerned. It is apparent from the law reports that much of the business done in Myanmar is done in partnership with others, or through agents, or both. But all these contracts show – to varying extents – the way in which much of the law of contract, in a broad sense, is an amalgam of general rules applicable to all contracts, and specific rules confined in their operation to a certain

kind of contract. However, in a general examination of the principles of contract law we can do no more than to look in summary form at this specialist material.

Chapter 12 says a little about the issue of reform of the law of contract, and asks whether any reforms are necessary or desirable. The conclusion is that modest reforms to the Act, mainly by way of giving certain additional powers to the courts, are probably desirable. There is no case for fundamental reform, say of the kind which proposed that the Companies Act of 1914 be swept away for no good reason. The Contract Act 1872 should be respected, and only upgraded to the minimum extent necessary to deal with defects. In other words, a Law to Amend the Contract Act should be a very short law.

2

Formation of Contracts

The way the law approaches and analyses whether contracts have been made

In this chapter we start at the beginning, with the rules which establish whether an agreement has been formed, and if it has been formed, with whether it will, in principle, take effect in law as a contract. There is obviously an overlap with what will be covered in the third chapter, when we look at 'void agreements', for that is just another way of saying 'non-agreements'. However, that chapter is more directly concerned with the cases in which the parties were under the impression that they had formed an agreement, only to discover or to be told by the Contract Act that they were wrong, and that the agreement they may have supposed to have been formed did not, as far as the Act was concerned, count as an agreement after all.

The purpose of this chapter is to examine and think about the way in which the law looks at the formation of contracts. We will organise the material under ten points, which are as follows:

1. The elements which make a contract according to the Contract Act;
2. Proposals;
3. Acceptance of proposals;
4. Consideration;
5. What converts an agreement into a contract;
6. The intention to create legal relations;
7. Practical problems with the formation of agreements: informality, incompleteness, imprecision, and incoherence;
8. Problems of formation with more complex contracts;
9. Agreements to negotiate and agreements not to negotiate;
10. Formation of agreements contrasted with variation of contracts already made.

Some of these points will be restricted to examination of the provisions of Chapter I of the Contract Act, but the later ones will test the extent to which the Contract Act is able to deal properly with some of the problems which arise in connection with the formation of contracts in a world in which methods of communication, and methods of contracting, can be very different from those which were known in 1872, and in which the expectations of modern commerce may call for solutions which would not have been known about in 1872, or even in 1972. It is always important to

remember this when dealing with the Contract Act: it was enacted to assist the development of commerce, not to hold it back. We should always keep this in mind when questions of its interpretation arise.

2.1 The elements which make a contract according to the Contract Act

We start with Section 2 of the Act, and although we are initially concerned only with Section 2(e), it is convenient to set out a large part of the Section, in order to show the manner in which the Contract Act sets out the elements which lead to an agreement, and then to a contract:

2. Interpretation clause. In this Act, the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
- (c) The person making the proposal is called the ‘promisor’, and the person accepting the proposal is called the ‘promisee’;
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise;
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;
- (g) an agreement not enforceable by law is said to be void;
- (h) an agreement enforceable by law is a contract...

In other words, we first look for a **proposal** (Section 2(a)), and then for its **acceptance** (Section 2(b)), which creates a **promise**. If there is **consideration** for the promise or promises, there is an **agreement** (Section 2(d), (e) and (f)). If the agreement is not made void by the Act, the agreement is enforceable by law and is therefore a **contract** (2(g) and (h)). This suggests that the law takes a very organised, step-by-step, approach to the formation of contracts, and that the formation of contracts requires each element to be separately identified and separately satisfied. There are, in principle, six elements in the analysis: proposal-acceptance-promise-consideration-agreement-contract: P-A-P-C-A-C.

Before we go any further there are two preliminary points to make. The first is that this structure, set out by the Contract Act for the formation of contracts, is elaborate. In many other common law jurisdictions, the equivalent would be proposal (or

offer), plus acceptance equals an agreement which, provided there is consideration, constitutes a contract. In particular, there would be no distinction between proposal (or offer) and promise, for the proposal would be seen as a promise which would become an agreement on acceptance. In other words, there would be five not six steps (proposal, acceptance, agreement, consideration, contract). To point out this difference is not to suggest that one approach is better than the other, but it shows that the Contract Act analysis, which this book will follow, is more elaborate than one might expect it to be.

The second general point is that the life of ordinary people is not as tidy as those who draft the law might wish it to be. And when this is appreciated, it is the law which has to bend to accommodate real life, not real life which has to bend to fit the law. A very senior English judge, in a case before the Privy Council on appeal from the courts of New Zealand,¹ said something of real significance, which is worth quoting here. It contains important guidance for anyone dealing with the common law system of contract and contract formation:

‘It is only the precise analysis of this complex of relations into the classical [proposal]² and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g., sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers’ guarantees; gratuitous bailments; bankers’ commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of [proposal], acceptance and consideration.’

The reason this is important is because it acknowledges that there are many kinds of contract, from the everyday case of the person who gets onto a bus to the fantastically complicated contracts which are used in international commerce, which do not naturally seem to follow the clear and separate steps of the kind set out in the Contract Act. Yet we are required by our law – by the common law of which family of law Myanmar is a part, and by the Contract Act 1872 which lays down this part of the common law in Myanmar – to demonstrate how these real and everyday contracts fit into this formal structure. In this chapter, once we have understood the basic framework put in place by Chapter I of the Act, we will do some of this fitting in of contracts. We will always bear in mind that, although the Contract Act is precise, real life is untidy; that businessmen do not check their copies of the Contract Act before they make or respond to a message from those they are negotiating with; and that ordinary people are far too busy just trying to cope with the stress and strain of daily life to care about any of this analysis. But it is the law of Myanmar, and it is the duty of contract lawyers in Myanmar to explain how it works for ordinary people

¹ *The Eurymedon* [1975] AC 154, at p 167.

² We have replaced ‘offer’ in the English original with ‘proposal’, which means much the same thing, and which is the term used in the Contract Act.

making domestic contracts, as well as for companies and commercial organisations making complex commercial deals. The Contract Act applies to them all.

Is it possible to have an agreement, or a contract, which does not fit, and which simply cannot be made to fit, within this framework, or this sequence of events? The answer to that is yes: there are certainly contracts which do not quite fit this sequence of creation.³ Contracts are now made in circumstances which are much more challenging than anything found in the Illustrations in Chapter I of the Act, and it would be damaging to Myanmar law if it were to be held that the Contract Act was not capable of dealing in a business-like way with such contracts. How, therefore, is this to be done?

In some cases Section 13(3) of the Burma Laws Act 1898 will provide a solution, allowing or requiring a court to fill in gaps in the written laws by the application of the principles of justice, equity and good conscience:⁴ in this context, perhaps, it should be taken to mean that the court will apply good commercial sense. We remember, second, that the Act is a Code, but not, according to the preamble, a complete Code. And we need always to remind ourselves that the Contract Act was made to facilitate the process of contracting, not to impede or to complicate it or tie it up in red tape. Our task is to approach the Act with this in mind.

We should also acknowledge that there may well be several perfectly sensible answers to a question, and it is not always necessary to select between them. For example, as we shall see below, the analysis of how a contract is made in a shop is not always clear: it could be the customer who makes a proposal to buy, which the shopkeeper accepts or rejects as he chooses; it may be the shopkeeper who makes the proposal to sell, which the customer accepts or rejects as he chooses. Each analysis will lead to the conclusion that there is a contract of sale, and in those many cases in which each side is happy with that answer, the details of the legal analysis are not that important. But in those rare cases in which it does matter – where the law asks when, precisely, a contract came into existence – we may need to be more careful about our analysis, and will need to deal with the rules which we are about to examine.

Are there any other requirements, not expressly stated in Section 2, which must be satisfied before an agreement, or a contract, is formed? We will deal with some specific points in the third chapter which mean that the agreement is void, or that the supposed agreement is void. One point, however, is not mentioned anywhere, and that is the intention of the parties to create legal relations. We will think in greater detail about that under point (6) of this chapter, but it is sensible to say something about it now. The Contract Act deals with contracts which are subject to the enforcement processes of a court. The effect of making a contract to which the Act applies is that it is potentially subject to judicial supervision and enforcement if anything should go wrong. Yet we all make agreements in our daily lives which we would never imagine had anything to do with the courts or with the legal system. The husband who promises to buy his wife a new dress if she will accompany him to

³ In *Maung Po Naing v Ma On Gaing* AIR 1917 PC 214, the Privy Council accepted that the rigour of the common law analysis, which may make sense if applied strictly in England, may need a greater measure of flexibility in Myanmar where the manner in which business is done may be rather different.

⁴ See above, Chapter 1.2(ix).

his company's annual dinner does not expect the agreement to land him in court if he forgets or changes his mind. The intention to create legal relations may not be specifically mentioned in the Act as one of the requirements for the formation of a contract, but we must accept that it is there, written in invisible letters.

Let us therefore begin with proposals, and how they are made.

2.2 Proposals

A proposal - what some other common law systems refer to as an offer - is the label we use 'when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence'.⁵ Sometimes a person will say to another: I will do this if you agree to do that, and if this is followed by what the law regards as an acceptance, the proposal becomes binding and, according to the Act, is turned into a promise.⁶ What we have to consider here is what a proposal is, how it is communicated to someone else, how long it exists as a proposal which is open for the other party to accept, and how revocation of a proposal may be prevented.

(a) What is a proposal?

Section 2 of the Act is drafted on the basis that a proposal can be accepted, and that when it is accepted the first step towards the making of a contract - the making of an agreement - has been taken. It follows that a proposal should be a statement that lends itself to acceptance. It should be something which the party to whom it is addressed could accept with a simple 'I agree'. In a few words, it cannot be a proposal unless it can be accepted; and we therefore have to know a little about acceptance in order to decide whether we are dealing with a proposal. In slightly more words, we need to be able to see that what the person who made the suggested 'proposal' said or communicated was a statement that he was willing to be bound, and to have his proposal turned into a promise, by the simple acceptance of the other party and without further involvement of his own part. In other words, he had given the other party an option to say yes or no.

It follows that something is not a proposal if it is really just an invitation to another party to enter into negotiations.⁷ It is not a proposal if it is an invitation to another to make a proposal. For example, if I have a car for sale and I advertise it, saying 'offers above \$5000', I do not make a proposal. I am asking or inviting other people to make proposals to me, telling them what sort of proposal would be likely to interest me. English lawyers would call such a statement an invitation to treat, or an

⁵ Contract Act, section 2(a).

⁶ An alternative analysis, but which is not that used by the Contract Act, would be that the proposal is itself a promise which becomes binding on the proposer when it is accepted. This analysis uses two stages to reach the point which, under the Contract Act, takes three.

⁷ For an excellent illustration see *Hardandas v Rani Mohori Bibi* (1913-14) LBR 343 (telegraphic communications concerning a possible sale, but even if there was a clear proposal, it was not followed by an unconditional acceptance).

invitation to offer; but it does not really need a name. By contrast, if I say ‘car for sale to the first person to offer \$5000’, I make a proposal, for all that is required to produce full and complete agreement is for another person to tell me that she agrees to pay \$5000. Notice that although I may appear to say that the buyer is invited to offer, the law will say that I made the proposal, and that the would-be buyer accepted it.

If I say ‘car for sale to highest bidder; all bids to be received by 5pm’, this too will look like a proposal. I am not inviting people to negotiate with me; I am telling the world that whoever is the person who makes the highest bid is the person to whom I will be bound to sell the car, with no further question asked. A slight difficulty may arise if a person responds to such a proposal by saying that she makes a bid of ‘\$50 higher than the next highest bid’, claiming that by doing so she has submitted the highest bid, but we will deal with this case below, for the issue it raises is better analysed within the law on the acceptance of proposals.⁸

If I announce that my car is for sale for a price above \$5000, and you say: ‘Agreed’, there is no agreement, because my statement was not a proposal. There is no agreement, for if one were to ask a judge what price was agreed to, the judge will say that no price has been agreed; no price, no contract. The reason for this is that I invited you and the rest of the world to make a proposal. You made one (even if you thought it was an acceptance), and it was then up to me to decide whether to accept it.

Suppose in this last example you had said: ‘I will buy it for \$6,000’. Does this change things, and mean that you have accepted my proposal? Again, the answer is no, because I did not offer or propose the sale of my car for sale for \$6,000; and you cannot accept a proposal which I did not make.⁹

This set of simple cases teaches us a number of things. One is that people may make proposals without realising that this is what they have done. Another is that people may not have made proposals even though they think they have, and may have made acceptances even though they were asked to offer something. And a third is that we can sometimes only decide if something is a proposal by enquiring into whether it would be possible to accept it. The question is whether the communication from one side was, in effect, a statement of unconditional willingness to be bound, to have the proposal converted into a promise, by a simple conforming acceptance. It may require us to think for a moment before we leap to the conclusion that there was an acceptable proposal and an acceptance of it.

What, then, do we say about the person who advertises his bicycle for sale for 20,000 kyats, or a shopkeeper who puts goods on a shelf in his shop with a price label attached? It might be thought to be obvious that in these cases the seller is proposing to sell, and that the proposal can be converted into a promise to sell by a simple and straightforward acceptance by the customer. If you think so, many people would agree with you. But it may not be quite so easy: think about it this way. Suppose ten people respond to the owner of the bicycle, saying that they agree to buy it for 20,000 kyats: have they all accepted the proposal? Does the owner now face being sued by at least nine of them if he fails to deliver the bicycle to them? Questions like

⁸ Chapter 2.3(f), below.

⁹ *Hardandass v Rani Mohori Bibi* (1913-14) LBR 343.

this lead some people to think that the advertisement cannot really be a proposal, even if it looks like one.

And what of the shopkeeper: is he bound to sell to the customer who picks up the item and brings it to the till? What if the price label stuck to the item was wrong: does the shopkeeper have to sell it at the price marked? What if the shopkeeper takes the responsible view that he should not sell the thing (say a knife, or a hammer) to this particular customer: is he bound to do so? Questions like this lead some people to think that the display of goods cannot be seen as a proposal to sell them, but is in fact an invitation to a customer to make a proposal to the shopkeeper. It may be that in Myanmar it may be easier to understand that the customer proposes to the shopkeeper, and not the other way around, because few goods or services available for purchase or acquisition come with a price label fixed to them; it is easier in Myanmar than in, for example, England to understand that it is the customer who makes a proposal to buy, and that it is not the shopkeeper who proposes a sale. The shopkeeper, the taxi-driver, and so on, invite customers to make proposals, at least in the usual case. Of course, if the advertisement says 'for sale to the first person to offer 20,000 kyats', it is much easier to see that this is a proposal, for only one person can meet the terms, and there is no problem in treating this as a proposal. The answer in all these cases will depend on interpretation of the words and deeds, but also upon the commercial common sense of the relationship between the parties.

(b) How is a proposal communicated?

According to Section 4, and as a matter of common sense, a proposal has to be communicated:

4. **Communication when complete.** The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made...

It is hard to know why the Act deals with the communication of proposals, for the real issues arise in relation to acceptances and revocations. A proposal cannot be accepted unless, and until, the other party knows of it, and so an un-communicated proposal cannot be accepted. The reason for the statutory rule is a bit of a mystery.

(c) For how long is a proposal open for acceptance?

In principle, a person who makes a proposal is treated as making it continuously until he has brought to the attention of the other that it has been withdrawn and is no longer open, that is, that it has been revoked. It follows that a proposal can be accepted unless it has expired or has been revoked. The question of how it may be accepted (and converted into a promise) is considered below, but a proposal which says that it is open for acceptance until the last day of the month obviously cannot be accepted on the first day of the following month, for that would be to accept a proposal which had not been made.

It is always possible, of course, that a proposal will not be accepted: if not accepted, it does not have any effect in law. But as said, a proposal which has been made may be revoked by the proposer, with the consequence that a person who might otherwise have accepted it is no longer able to do so. Section 5 explains *when* this may be done:

5. Revocation of proposals and acceptances. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards...

It follows that if I have offered my car for sale to the first person to agree to pay a certain sum for it, I may revoke this proposal if the communication of its acceptance by another is not yet complete: we will deal with what this means below. It is obvious that if there has been no acceptance, no harm is done to anyone if I withdraw the proposal. For this reason the Contract Act¹⁰ allows unaccepted proposals to be revoked.

And Section 6 explains *how* the revocation is done:

6. Revocation how made. A proposal is revoked -

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- (3) by the failure of the acceptor to fulfil a condition precedent to the acceptance; or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

We do not need to say much about Sections 6(2), (3), and (4) which largely speak for themselves. As to Section 6(2) there will, no doubt, be cases in which there is an argument about whether the time which has elapsed without communication of acceptance is a reasonable time, but there can be no hard and fast rules: it will depend on the nature of the contract or on the nature of the goods or on any previous dealings between the parties. Section 6(3) is also easy enough: if I say that you must do a specific thing in order to accept the proposal – say, pay a certain sum of money by a certain date - and you do not, then the offer is revoked. The Act might have said that in such a case the proposal is not accepted, but it goes further and treats the proposal as though it had said that ‘unless a specific thing is one by a specific day, the proposal lapses’. It will follow that it will not be possible for it to be accepted later because it has already been revoked. The situation described by Section 6(4) is not one which comes up very often.

Revocation by communication of notice of revocation raises delicate questions. What does a person actually have to do if she is to be able to say that she revoked the

¹⁰ However, in *Municipal Corporation of Rangoon v Saw Willie* (1941) RLR 724, AIR 1942 Ran 70 it was held that where specific legislation (in that case, the Rangoon Municipal Act, and rules made by the Corporation under the legislative authority of the Act) overrode Section 5 and provided that a tender submitted to the Corporation was irrevocable, Section 5 did not apply.

proposal by communicating notice of her revocation? The answer comes from Section 4, the third (unnumbered) point of which says:

4. Communication when complete. The communication of a revocation is complete:

- as against the person to makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
- as against the person to whom it is made, when it comes to his knowledge.

This means that you can no longer accept my proposal if the fact that I had revoked it had come to your knowledge. That is easy enough, but what of the case in which perhaps you should have known, but did not actually know, that I had revoked the offer? Suppose I revoke by letter, which is delivered to you but which you do not open, or I revoke by sending a telephone message to your voicemail, or a text message to your mobile telephone, or an e-mail to your e-mail address, but for some reason you do not open the letter, play back the message, read your text or e-mail at the time when I would have expected you to have done so? If Section 4 means what it says, there is no revocation by the communication of notice of revocation if the notice has not come to the knowledge of the other party. However, a court may consider that if a proposer has done all that he reasonably could to communicate his notice of revocation, and that the reason it did not come to the knowledge of the other party was because he behaved unreasonably in not checking for messages in a timely fashion, the proposer has done enough to revoke the proposal. This would involve interpreting 'knowledge' in a particular way or reading words into Section 4 which are not there (such as 'or would have come to his knowledge but for his own fault') and, in line with the general common law idea of constructive knowledge, there is good reason to think that that is what would be done.

Something similar may be needed for the case in which I advertise a reward for the person who finds my lost bicycle. If I decide to revoke this proposal, perhaps because I no longer want the bicycle, and do not wish to pay the reward to the finder, it cannot really be necessary for me to communicate notice of revocation to the person or persons who may be looking for the bicycle: I do not know who they are, after all. A sensible solution would be for the law to be that, as long as I publish the revocation in the same way that I published the original proposal, that would be sufficient to revoke the proposal. However, it may be just too difficult to stretch the words of the Act to allow for this; it may be that the Contract Act means that there are some proposals which, once made, cannot be revoked by the communication of notice and for which revocation by the other paragraphs of Section 6 is all that is allowed.

(d) Can the revocation of a proposal be prevented in advance?

The only way to prevent the revocation of a proposal which has not been accepted is to show that there was a (separate) agreement not to revoke it. Suppose you propose

to sell me your car for \$5000, but I realise that I will need time to find out whether I can raise the money. The problem for me is that if I have not yet communicated my acceptance, you may communicate notice of revocation at any time before that.¹¹ The only way to prevent this is for me to enter into a separate agreement, which takes effect as a separate contract, with you that the offer will be kept open for a certain period, and will not be revoked before then. Like all other agreements which are intended to operate as contracts, there will need to be consideration for your promise to keep the proposal open for my acceptance. But if I pay or otherwise provide consideration for your promise to keep the proposal open and to not revoke it, I have purchased an 'option' to accept the proposal within the stipulated period.

(e) Can a proposal be revoked when the other party has started to perform the acts specified as acceptance?

The Act says that a proposal may be revoked at any time before the communication of acceptance is complete. This makes sense where the other party has not yet decided, or has not yet acted upon his decision, to accept. But it is much less satisfactory if the other party has started to perform the acts required by way of acceptance, but has not yet completed them. As we shall see below, in relation to Section 8, performance of the conditions of a proposal will be an acceptance; it appears to follow that partial or incomplete performance will not. If that is so, the proposer would be free to revoke a proposal – assuming that the revocation is communicated – at the point at which the other party has almost, but not quite, completed the acts specified as required for acceptance. So for example, if a person offers a prize to the student whose performance is the best in the year, but just before the end of the year notifies the students that he has revoked the offer, it would be unsatisfactory if those who had worked hard in an attempt to satisfy the conditions were deprived of the opportunity to meet the condition, accept the offer, and claim the prize. Again, if I promise to make a payment to a person who walks from Pegu to Yangon to raise money for a charitable cause, but then revoke the offer as he approaches Yangon, Section 5 would suggest that I am free to do so, because acceptance has not yet taken place. This would not be satisfactory.

One possibility would be to argue that there is a distinction between (on the one hand) acceptance of the proposal for the purpose of claiming the payment or the reward, for which full performance of the conditions would be required, as Section 8 says, and (on the other hand) acceptance of the proposal for the limited purpose of preventing its revocation. In effect there would be a distinction between full acceptance for the purpose of enforcing the offer, and limited acceptance for the purpose of preventing revocation. So, for example, if I advertise a reward for the person who finds evidence that a rare animal is not yet extinct, and an explorer spends a lot of money in mounting an expedition into the remote jungle to look for it, I would not be permitted to revoke the proposal if the explorer had embarked on doing what I had specified, though I would not be bound

¹¹ *Ma Thin v HM Yassim* AIR 1916 LB 18.

to pay the reward unless a conforming discovery were made. Although the law is not yet clear on this point, the analysis put forward here appears to be consistent with the requirements of ‘justice, equity and good conscience’ as laid down in Section 13(3) of the Burma Laws Act 1898.

If there has been a proposal, and there has been no effective revocation of it, we next need to consider how a proposal is accepted.

2.3 Acceptance of proposals

We need to examine the definition of an acceptance to be able to decide whether there has been an acceptance, and to identify the date on which an acceptance is effective to convert the proposal into a promise.

(a) The definition of acceptance

According to Sections 7 and 8,

7. Acceptance must be absolute. In order to convert a proposal into a promise, the acceptance must –

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

8. Acceptance by performing conditions or receiving consideration. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

In other words, there is acceptance by expression of agreement, and acceptance by the performance of a condition specified by the proposer; and each of these is capable of being interpreted flexibly. Once an acceptance, which conforms to the proposal, has been effectively made by the person to whom the proposal is made, the proposal becomes a promise.¹²

(b) Who may accept a proposal?

It is obvious – the Act does not say so, but that does not matter – that the acceptance must be by the person (if it was specifically addressed to one person only), or by a

¹² *SM Bholat v Yokohama Specie Bank Ltd* AIR 1941 Ran 270 explains that the acceptance must, if not made by the person to whom the offer is made in person, be made by a person with authority to act on his behalf, and not by an unauthorised employee. For what counts as authority, see further below.

person who falls within the class (if it was directed to a class of persons) to whom the proposal was addressed. Where this does not happen, and a proposal is 'accepted' by someone to whom it was not addressed, or was not open for acceptance, there is no acceptance and therefore there can be no promise, no agreement, and no contract. In a case like this it is likely that there has been some form of mistake, and for this reason we will explore the case further in the following Chapter.¹³

(c) Acceptance by expression of agreement

If you offer to sell me your bicycle for 20,000 kyats, and I say 'I agree', or 'I accept', or use words which convey the same meaning, your proposal is converted into a promise by my acceptance. I have expressed unqualified and unconditional agreement to your terms, and this will comply with the definition in Section 7(1). However, if I say 'Give me time to think it over', or 'Would you accept 15,000?', this is not an acceptance of the proposal. The position is the same if I should say 'I agree if you will arrange for the delivery to my house': in this case the agreement which I express is qualified with further conditions or requests. None of these will be an acceptance, and in accordance with general principle, the proposer is not bound. He may therefore sell the bicycle to another person, or decide not to sell at all, by revoking the proposal which has not been accepted. If he does this, and the other party then changes his mind and decides to accept, he will be responding to a proposal which is no longer open for acceptance, and there will be nothing for him to accept.

It is for this reason that a person to whom a proposal is made, but who needs time to consider her position, to see whether she can raise the necessary finance, and so forth, is at risk of the proposal being revoked in the meantime. To avoid this, as we have seen above, she will need to make a separate agreement, supported by consideration, for the proposal to be kept open and not to be revoked. This constitutes an 'option' to accept the proposal, and is a common feature of many forms of pre-contractual negotiation in which an instant response is likely to be difficult to give.

The straightforward case of acceptance by expression of agreement is seen when parties deal face to face, and the acceptance is communicated from mouth to ear. But many contracts are not negotiated and agreed to in this way, and the expression of acceptance must take some other form. Section 7(2) is flexible in the manner in which it allows the acceptance to be communicated to the proposer: any reasonable means will do. However, if the proposer specifies the mode or manner of acceptance, this is binding on the acceptor. In principle, a proposer is entitled to say that his proposal must be accepted in the way he specifies, and it not open to the acceptor to say that some other means of expression of the agreement was just as good, or just as effective. If I say to the other party 'I must have your acceptance in writing by 4pm on Friday', and you purport to accept by telephone, or by sending an employee to say that you are accepting the offer, before then, I am entitled to say that this is not the acceptance I asked for.

¹³ See Chapter 3.3.

Likewise, if you deliver your acceptance in writing, but only on Sunday, but also say that as the offices were closed for the weekend, this makes no difference to the proposer, the proposer is entitled to say that this is not an acceptance which conforms to his proposal, and that it is not effective to convert the proposal into a promise. Section 7(2) does, however, provide for this irregular attempt at acceptance to be treated as effective if the proposer, who has received the irregular communication, has not done anything to show that he objects to the manner or form of the acceptance. His lack of objection may have the effect of converting an irregular acceptance into one which is legally effective.

(d) Date of acceptance

The application of the rule in Section 7(2) does require us to pinpoint the date of acceptance. That is done by Section 4, which says, in material part, that:

- 4. Communication when complete.** The communication of an acceptance is complete
- as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
 - as against the acceptor, when it comes to the knowledge of the proposer.

If acceptance is by posting a letter, the acceptance takes effect as against the offeror when the letter is posted; as against the proposer it takes effect when it arrives. The uncertainty which this rule can produce when communications are delayed in transit provides a powerful reason for a proposer to make it clear that he requires the acceptor to communicate his acceptance in a particular way.

The question of where a contract is made rarely arises in ordinary contract litigation, but it may be decisive for some purposes (for example, tax liability) and when it does arise, an answer of the kind given in Section 4 would not be satisfactory. The court will therefore ask, instead, where the acceptance was made. If acceptance is by sending a telegram, the place where the acceptance is made, and therefore where the contract is made, is the place from which the telegram is sent.¹⁴

(e) Acceptance by performance of conditions

If I say to you that I will pay you a sum of money if you find my lost ring, and you complete that performance, you have accepted my proposal and I am now treated as having made a promise to pay the sum which you are now entitled to demand. In such a case there is no need to express or communicate an acceptance, for the proposer has expressly provided that acceptance shall be complete on the performance of a condition which does not require notification by the acceptor that she is going to perform that condition. Suppose I advertise a new medicine which will prevent

¹⁴ *Messrs WW Wood & Sons v The Commissioner of Income-Tax Burma* (1963) BLR 45 (CC). A similar, but different question arises if it is necessary to say where a cause of action in contract arose for the purpose of ascertaining whether a court has jurisdiction under the Civil Procedure Code, section 20, for it is perfectly feasible to say that a cause of action arose in more places than one, and that this is sufficient to establish the jurisdiction of the court: see *Shantilal Surajmal Mehta v Mariam Bibi* (1960) BLR 359 (HC).

the person who takes it catching the flu and I say that, if anyone who uses the medicine in accordance with the instructions for a month catches the flu, I will pay them a sum of money. A person who uses the medicine for a month satisfies the condition which I specified; and if they nevertheless catch the flu, I am bound to make the payment, as my proposal, which was accepted by performing the acts specified, has become a promise.

Suppose I make the proposal, and you have started to use the medicine, but before completion of the course I revoke the proposal. It might be thought that as you have not yet accepted the proposal, because you have not yet fulfilled the condition which I specified for acceptance I am free to revoke the proposal. We dealt with this question in the context of revocation of proposals,¹⁵ but return to it here as it is equally an aspect of the law on acceptance. It may be contended that a person who intends to accept by the performance of conditions runs the risk that the proposer will revoke the offer so that the acceptor has acted in vain. But the better view is that once the acceptor has embarked on the acts which will constitute acceptance if they are all performed, the proposer loses the power to revoke the proposal, even though authority for this analysis is hard to find. If the answer were to be that the proposal could be revoked just as the other party is finishing the performance stipulated as amounting to acceptance, it would be contrary to 'justice, equity and good conscience', with the result that Section 13(3) of the Burma Laws Act 1898 provides the solution.

In other common law jurisdictions, the difference between a contract formed by the exchange of promises, and a contract formed by a promise followed by the performance of stipulated conditions, is indicated by calling the first kind of contract a 'bilateral' contract, and the second type a 'unilateral' contract. In a bilateral contract both parties are bound, whereas in a unilateral contract only one party is bound (because only one party is making a promise). These terms do not appear in the Contract Act, but Section 8 of the Act, in particular, is a clear indication that Myanmar law reflects this natural distinction between types of contract.

(f) The acceptance must conform to the proposal

We should return to the seller who makes a proposal to sell his car to the highest bidder. If a calculating buyer responds to the proposal by making a bid of '\$50 above the next highest bid', and claims by doing so that she has submitted the highest bid, she will probably fail. The law will say that the seller's proposal only invited bids expressed in absolute terms, in real numbers, and could therefore be accepted only by a bid which conformed to this description.¹⁶ The 'referential' bid did not conform to the terms of the proposal and will be ineffective as an acceptance.

¹⁵ Chapter 2.2(c)-(e).

¹⁶ A justification for this conclusion is that, if a referential bid were effective as an acceptance of such a proposal, a real problem arises if there are two such bids. What seems to be a perfectly sensible way of selling a car would become unworkable.

(g) Acceptance by silence?

Is it possible to accept by simply remaining silent? In principle, the answer must be no. If a person who wishes to acquire land approaches a small farmer and says 'I am willing to buy your land for \$1000, and unless I hear from you by Friday we will have a contract', then if the farmer does not respond, one could not say that this formed a contract which required the farmer to part with his land for \$1000. In principle a person is entitled to ignore a proposal made to him.¹⁷

But suppose we have been negotiating for the sale (by me) and purchase (by you) of a horse, and we have settled on a price; and suppose I say to you that unless I hear from you to the contrary, I shall assume that you are buying it. You say nothing more: does that allow me to say that acceptance has taken place? It seems unreasonable that a party who does not respond to a proposal can be considered to have accepted it, but on the other hand, if you were to argue that you had bought the horse and were entitled to demand it, and that you had no need to express or communicate your acceptance because I had said that you did not need to, it seems that the you would be right and that you would have converted my proposal into a promise. In other words, the law does not require me to speak out to prevent a proposal turning into a promise, but if the proposer says that he does not need to have acceptance expressed to him, he can be held to what he has said; and if the other party wishes to accept the proposal, he is free to do so, by silence if that is what the proposer has stipulated. In short, the proposer can waive the need for communication of acceptance so that silence can constitute acceptance but, in contrast, the proposer cannot insist, if the other party is unwilling, that silence shall constitute acceptance.

(h) Acceptance without knowledge of the terms

It is generally accepted that a person cannot accept a proposal of which he had no knowledge, even if he acts in conformity with the terms of the proposal. For example, if you have lost your wallet or your ring and I find it and return it to you, but when I did this I was unaware that you had advertised a reward for finding it, I cannot claim the reward (even though you would be acting without honour in taking that technical point against me).¹⁸ On the other hand, when I do accept a proposal, it is not necessary that I know or understand the terms contained in it. For example, when I make a contract with an airline, I accept a proposal but have no, or almost no, knowledge of the terms on which the airline proposes to deal with me: I neither know, nor care about this. This goes to show that it is not necessary for me to know or understand the terms of the proposal, though as said, my acceptance must be based, or considered to be based, on knowledge of the existence of the proposal. The question whether all of the

¹⁷ *SM Bholat v Yokohama Specie Bank Ltd* AIR 1941 Ran 270, following and applying the English authority of *Felthouse v Bindley* (1862) 11 CBNS 869.

¹⁸ See *Lalman Shukla v Gauri Datt* (1913) Allahabad LJ 489 (no reward for a person finding son who had absconded if the son was found and returned before finder knew of the reward, though in this case the finder did know of the reward). For the real reason there was no contract, see the discussion of consideration, below.

terms of the proposal thus accepted are binding on me, especially where they are harsh or unkind terms, is covered as part of chapter 5 on the terms of the contract.

(i) Acceptance converts the proposal into a promise

When an acceptance takes place, the proposal is converted into a promise by which the proposer – now the promisor – is liable to be legally bound. She can no longer withdraw the proposal, because it is no longer a mere proposal. It now has the status and effect of a promise, of something from which an agreement, and then a contract, may be formed.

2.4 Consideration

The factor which converts the promise or promises into an agreement is consideration, as is shown by Section 2(d) of the Act which has been set out above. A promise, standing alone, is not by itself enforceable; the common law, and the Contract Act, requires the promise to be supported by consideration before it may become a contract.¹⁹

What is consideration? In summary, it is what the promisee (the person to whom the promise is made) or what another person, does in return for the promise which the promisor has made. As Section 2(d) makes clear, this something may take the form of doing an act, such as making a payment of money; or it may take the form of an abstaining from doing something which one would otherwise have been free to do, such as giving up a claim. Consideration may also be found in the promise to do, or to abstain from doing, something. It is reiterated in Section 2(e) of the Act that mutual promises are good consideration for each other. This is the reason why we have an agreement if I promise to pay 10,000 kyats for your book which you promise to deliver to me: the paying or the promise of paying is capable of amounting to consideration.

So for example, if A agrees to sell his house to B for \$50,000, the promise of B to pay \$50,000 is the consideration for A's promise to sell the house; A's promise to sell the house is the consideration for B's promise to pay \$50,000.²⁰ If C promises, for a certain sum paid to him by D, to make good to D the value of D's cargo if it should be lost at sea, C's promise is the consideration for D's payment, and D's payment is the consideration for C's promise.²¹ If E promises to maintain F's child, and F promises to pay E 50,000 kkyat per month for the purpose, the promise of each party is the consideration for the promise of the other party.²²

¹⁹ *Ma Mo v Ma Set* AIR 1926 Ran 71 (no consideration meant deed of sale was void; there was no requirement to apply under Specific Relief Act s 42 for cancellation of an instrument which was void); *Maung Par v U Tun Hlaing* (1952) BLR 32 (HC) (no consideration for a document by debtor in which the creditor did not appear to give up, or promise to give anything up.).

²⁰ Illustration (a) to Section 23.

²¹ Illustration (c) to Section 23.

²² Illustration (d) to Section 23.

If a person - and it does not need to be the promisee²³ - promises, or does, something which the law regards as having value, at the desire of the promisor (for example, in return for the promise) there will be consideration for the promise. There are therefore only two requirements. The first requirement that the promise, act or abstinence is of value is implicit in Section 2(d). The second explicit requirement is that the promise, act or abstinence is 'at the desire of the promisor'. If there is consideration, the agreement may be a contract; however, it does not necessarily follow that if there is no consideration the agreement is not a contract because, as we shall see,²⁴ Section 25 makes clear that, while an agreement without consideration is normally void, in certain defined circumstances the absence of consideration does not render the agreement void.

We now turn to consider the two requirements.

(a) Something of value

Promising or paying money will generally be seen to be of value for the purpose of the law on consideration, as will promising or performing a service, as will forbearing to pursue, or otherwise giving up, a legal claim.²⁵ It is no part of the law (and this is made clear by the second Explanation to Section 25) that the consideration must be proportionate in value to the promise for which it is given, for it would make the law very uncertain (and the making of profitable bargains would be hampered) if consideration had to be in some sense 'adequate' or 'proportionate' to the advantage which the promise will give.²⁶ This also means that the law allows agreements to take effect as contracts by the provision of a token payment, or a token act: the ability to give and take 'nominal consideration', as it is sometimes called, is important for the way in which it allows parties to give contractual force to an agreement which they wish to make legally binding. So for example, an agreement to sell a bicycle for 100 kyats may be a contract; an agreement to sell a horse for a sum representing 1% of its probable value may be a contract;²⁷ an agreement to pay 1000 kyats for the transfer of a parcel of much more valuable shares in a company may be a contract. So also is a promise to pay 100,000 kyats for a caged bird: the law of contract does not ask whether the consideration is too much or too little: so long as their consent was free,²⁸ the size or nature of consideration which supports the agreement is a matter for the parties to decide for themselves; and because this point is dealt with explicitly in the second Explanation to Section 25, we will return to it in due course.

By contrast, if the so-called consideration has *no* value, it is not consideration after all. A promise to pay a sum of money in return for a smile, or in return for love and

²³ In other words, 'consideration need not move from the promisee'. The importance of this, which is linked to the question of whether there is a 'privity of contract' doctrine in Myanmar, is discussed in Chapter 5.

²⁴ Chapter 3.5. ²⁵ *Maung Par v U Tun Hlaing* (1952) BLR 32 (HC) (no forbearance).

²⁶ *Kalimuthu v Maung Tha Din* AIR 1936 Ran 491 (consideration small, but adequacy not an issue for the court).

²⁷ Illustration (f) to Section 25.

²⁸ Which is examined in Chapter 4.

affection, is almost certainly not supported by consideration: these things, even if they are desired by the promisor, have no economic value, even if they were capable of definition and measurement, which they are not. And a promise to pay 100 kyats in return for the payment of 100,000 kyats is not good consideration, either: simple arithmetic is all one needs to show that this is not an exchange of things which have value, but a gift pretending to be a contract.²⁹ It is for this reason that if A promises for no consideration to give a sum of money to B, the agreement is void. If A makes the payment it may be effective as a gift, but the law of gifts regulates the legal consequences of gifts.³⁰ The law of contract looks after contracts, and this is why we need to be able to distinguish between them.

It has also been said that if I promise to pay you a sum of money if you return my watch, which you have stolen from me, there is no consideration for my promise, for what you do has no value in the eye of the law. The explanation is that you were already duty-bound to me, in law, to return my property, immediately; and to do what you are already bound to me to do is not to furnish me with any benefit; the value of the return of a thing stolen by a thief to its owner is zero, for though I am happy to have the watch back, I was always entitled to it.³¹

Similarly, if you are my employee and you perform the duties of your employment, you do only what you were bound to me to do; the performance of these duties could not, in principle at least, be seen to be consideration for a fresh promise by me to increase your wages.³² However, and this is an important point to which we return in chapter 6, as the consensual variation of the terms of the contract does not, in Myanmar, require consideration to make it legally binding, the fact that there is no consideration where one party merely performs what she was already bound to do under the contract, is, in contrast to many other common law systems, not a problem.³³ The variation is effective despite the lack of consideration.

(b) At the desire of the promisor

Consideration, whether it takes the form of doing or promising to do (or abstaining or promising to abstain), must be ‘at the desire of the promisor’ if it is to satisfy the definition in Section 2(d). If I ask you to do something, such as to dig my garden, for which I promise to make you a payment, the digging or the promise to dig is plainly something which is done ‘at my desire’: if I asked for it, it is obviously done at my desire: the first four Illustrations given under Section 23 make the point.³⁴

²⁹ It may be different, though, if I pay you a sum of money today in exchange for your promise to pay me (or to pay someone else) a larger sum of money in ten years’ time.

³⁰ Dealt with in the Transfer of Property Act, ss 122–129.

³¹ *Ma Shwe Khan v Maung Khan* (1902-03) UBR 8. It is obviously different if the promise is to pay a reward to the finder of my watch, for although the handing over of the watch, when found, is required by law, the searching for another’s lost property was not, and therefore has value: see Illustration (c) to Section 25.

³² *Lalman Shukla v Gauri Datt* (1913) Allahabad LJ 489.

³³ See further, 6.10.

³⁴ Section 23 is set out below, Chapter 3.6.

But suppose you do something for which I am grateful, but which it cannot be said that I asked for: can it then be said that the doing was 'at my desire'? Suppose our marriage has broken down and we are planning to separate, but that I promise to pay you a sum of money each year. As a result of the promise, you do not take me to court to ask for a divorce, or for financial maintenance or other support: in short, you abstain from doing something which you might otherwise have done: is there, in your forbearance, consideration for my promise to pay you money? The answer is not clear. It may well be correct to say that your conduct, in abstaining from legal proceedings, is something which I welcomed, or even hoped for; but I did not ask for it. If that is an accurate statement of what was or appeared to be in my mind, does that lead to the conclusion that the abstaining was or was not 'at my desire'? Some common law systems interpret this aspect of the law of consideration as meaning that the consideration has to be something which was asked for, either expressly or by implication.

It may however be that the Contract Act sees that consideration is present when I encourage you to act in a particular way, which I welcome, even though I do not actually ask you to act in that way. To give another example, which is similar to the example of the marriage breakdown above, suppose that I promise to make a financial contribution to a charitable organisation which is undertaking a building project and which is to be funded by contributions from its supporters. If I then refuse to pay, is the fact that the work was done in accordance with my wishes, and was what I intended to happen, sufficient to say that it was done 'at my desire'?

This is a difficult question. But it can be powerfully argued that the stress given in Section 2(d) to a promisee doing or abstaining from something desired by the promisor naturally embraces where the promisee has relied on the promise even if the reliance was not asked for by the promisor. 'At the desire of' is not the same as 'at the request of'. What it would plainly not cover would be reliance by the promisee that was not desired by the promisor.

(c) Agreement enforceable as a contract though consideration is inadequate

As we have shown, the Act draws a distinction between agreements supported by consideration and those not so supported. In the case in which there is consideration - in the sense that there is something of value, whether a small sum of money or other thing - but this consideration appears to be wholly out of proportion with the promise which it is sought to enforce, the Second Explanation to Section 25, which is set out below,³⁵ states that there is consideration, but that the very small size of it may be a reason to check that consent was freely given.³⁶ This makes sense, but one must be careful of reading too much into it. If I agree to sell a horse for a sum which is one-tenth, or one-hundredth of its value, one possible explanation for my actions

³⁵ Chapter 3.5.

³⁶ *Kalimuthu v Maung Tha Din* AIR 1936 Ran 491 (consideration small, but adequacy not an issue for the court; no evidence that it was an extortionate and unconscionable bargain which could be set aside as contrary to public policy).

may be that I have been the victim of undue influence or other vitiating factor. But another explanation may be that because we knew perfectly well that a promise unsupported by consideration would not be enforceable as a contract, we agreed upon the payment of a token sum to ensure that consideration was present and that the promise was contractually binding. ‘Inadequate’ consideration, which means consideration which is present but very small indeed, may be a symptom of unfree consent, but may also be a sign that the parties used the law intelligently, to make a binding agreement where this would not otherwise have been possible.³⁷

2.5 The distinction between an agreement and a contract

If a proposal has been accepted and is converted into a promise, and if there is consideration for the promise or promises so that there is an agreement, the agreement is a contract unless it is a void agreement. As we have seen,³⁸ that is all made clear by Section 2 of the Contract Act with Section 2(g) laying down that ‘an agreement not enforceable by law is said to be void’ and Section 2(h) saying that ‘an agreement enforceable by law is a contract’.

It appears, therefore, that in addition to what we have so far looked at in this chapter, the only additional factor relevant to converting an agreement into a contract is that the agreement must be enforceable rather than void. The grounds on which the Contract Act lays down that an agreement is void (and they include whether the consideration or object of the agreement is lawful or not) are examined in the following chapter. In that regard, it should be noted that, although the Act does not say in express terms that an agreement is void where one or both of the parties are incompetent to contract, that interpretation of the Act has been established in the case law.

However, there is one confusing complication. This is because the Contract Act makes an additional observation as to which agreements are contracts, in Section 10:

10. What agreements are contracts. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration, and with a lawful object, and are not hereby expressly declared to be void.

Apart from four words, Section 10 confirms what we have just said. If the agreement is made by parties competent to contract, and the consideration is lawful, and the object of the agreement is lawful, and the agreement is not expressly declared by the Act to be void, the agreement is a contract.

However, the insertion into Section 10 of the four words ‘the free consent of’ is problematic. The question of whether the parties consented freely, or gave consent which was free, is examined in Chapter 4. As we shall see, if the consent of a party was not free, the contract may be voidable at the option of the party whose consent was not free, which means that the contract may be undone, unmade; but if she does

³⁷ See the Second Explanation to Section 25, which is set out below, Chapter 3.5.

³⁸ See above, Chapter 2.1.

not exercise this option, the agreement continues to be a contract. In other words, the contract is not void. It is therefore *not* correct to say that the free consent of the parties is required for there to be a contract. It follows that Section 10 must be interpreted in accordance with the overall scheme of the Act; and as a result, the words ‘the free consent of’ in Section 10 should be regarded as an oversight on the part of the draftsman, and disregarded for the purposes of understanding what constitutes a contract.

At this point we have examined the main stages in the process of formation of a contract, as this is set out in and regulated by the Contract Act. It is now necessary to deal with a small number of related points, not specifically mentioned by the Act.

2.6 The intention to create legal relations

Is every agreement in which there is consideration one over which the courts have jurisdiction? Is every agreement which I make one which carries the threat of legal proceedings if I fail to perform?

The answer is plainly no: there are plenty of agreements which are binding in honour only, but not binding as a matter of law. It could hardly be otherwise. In some legal systems, a promise made by a husband to his wife, to pay her a modest sum of money if she keeps the house tidy, may involve a proposal, acceptance, promise, consideration, and agreement, but it will not be a contract. The reason is that the parties did not expect or intend their agreement to be one which a court had power to enforce; the law will not suppose that they intended to make an agreement which the law would enforce against a defaulting party. The technical justification for this reason is that there is no intention to create legal relations, or, perhaps more precisely, the law will not conclude that there was an intention to create legal relations unless the circumstances of the case suggest that it should. Agreements made within the four corners of a matrimonial relationship, or in other domestic circumstances, will not generally be seen to have this characteristic.

It does not mean, however, that all agreements made within the family are outside the jurisdiction of the courts. Agreements by spouses to pay maintenance are obviously capable of giving rise to legal relations, at least in the sense that legal proceedings can be brought to enforce the obligation. And in Myanmar, it has been held that in a Buddhist marriage, a husband owes his wife a legal duty to maintain her, and that this duty can be enforced by judicial proceedings.³⁹ It may be better, however, to explain this result not as one which rests on an agreement which is intended to be legally enforceable, but on the law of status which is imposed on spouses regardless of any agreement.

Illustration (d) to Section 23, which we will examine below, suggests that a promise to pay a person for looking after the promisor’s child is enforceable as each promise is lawful consideration. But the Illustration does not suggest the existence

³⁹ *Ma Saw Nwe v U Aung Soe* (1939) RLR 527. It appears that marriage is considered to constitute an express or implied contract that the husband shall maintain the wife: *Ardaseer Curtetjee v Perozeboye* (1856) 6 Moo IA 348 (referred to and relied on in *Ma Saw Nwe v U Aung Soe*).

or absence of a relationship between the parties. If a mother promises the father to look after the child, it seems unlikely that this was intended as an agreement which would land the parties in court if it were not performed; but if the promise was made to a stranger, the position is likely to be very different. A contract by which a father agrees to sell part of his land to his son will be likely to be one which the courts may enforce: the fact that it is between father and son does not necessarily mean that it is not subject to judicial enforcement.

The common law refers to this idea, and this requirement, as the intention to create legal relations. The reasons for its use as part of the common law are practical as well as theoretical. As a practical matter, the majority of domestic and social agreements and disagreements are not easy for a court to investigate, even if they could do it: the evidence, at least, is likely to be very messy. At the theoretical level, if the basic premise of the common law is there is freedom of contract, that parties may make the agreements they wish to make so long as they do not violate the law of the land, there is no reason why parties should not be able to make an agreement which is not for judicial determination, but which will instead be binding on them only as a matter of honour: the freedom not to subject one's agreements to legal proceedings is a small part of the larger freedom to make or to not make agreements which are binding in law.

The same principle must apply where parties make an agreement which is 'subject to contract': this is a way of saying that the parties do not wish to be committed to each other, and do not wish the courts to be involved, until they have made a formal contract.⁴⁰ An 'agreement subject to contract' is, therefore, an agreement which is not supposed to be referred to the courts, even if it is departed from. The same would be true if the parties had agreed that they were not to be legally bound until a written contract had been drawn up.⁴¹

Where in the Contract Act is this requirement to be found? The answer is that it is not: there is no mention of a requirement that an agreement be one which was intended to give rise to, or to create, legal obligations. This is surprising. For it cannot be the case that in Myanmar wives can sue their husbands, or sons sue their fathers, whenever it is said that an agreement made between them was not carried into effect. Families and friends, as well as parties in negotiation, must have the power to create an environment which is regulated by honour and decency, but without recourse to the law of contract if anything goes wrong. This must be taken to be the law, even if the Act does not explicitly say so. This is best rationalised by saying that, in line with all other common law systems, 'justice, equity and good conscience' under Section 13(3) of the Burma Laws Act 1898 entails the recognition of a requirement of 'an intention to create legal relations.'

⁴⁰ For a similar argument, where the documents plainly showed that there would be no contract until a more formal document was generated, see *Burma Timber Co v American International Underwriters (Burma) Ltd* (1962) BLR 18 (HC); *The State Agricultural Marketing Board v Aung Trading Co* (1966) BLR 252 (CC).

⁴¹ See *DK Parekh v The Burma Sugar Co Ltd* (1948) BLR 257 (HC). But on a true construction of the agreement in that case, the drawing up of a written contract was an expectation, but not a pre-condition to being legally bound.

2.7 Practical problems with the formation of agreements: informality, incompleteness, imprecision, and incoherence

We should say a little more about one aspect of the formation of contracts, by returning to a point made earlier. We have seen how the Act identifies the stages of proposal, acceptance, promise, consideration, agreement and contract. If the world really were as tidy as that, the formation of contracts would be clear and straightforward. But in fact, life is not like that: in the course of a day a person will make several contracts, without giving a moment's thought to any of this. A professor may go to a neighbourhood stall for a bowl of noodle soup for breakfast, buy some fruit for her lunch, and then take a taxi to the University. She may buy a magazine on the way home, and go out for dinner. She will have made many contracts. The problems which we are about to deal with concern those agreements, just like these agreements, which are casual, informal or incomplete, as well as those in which the meaning of language actually used by the parties is rather problematic.

(a) Casual, informal and incomplete agreements

We make contracts, even in circumstances in which we do not really know what we are doing, with people who do not speak our language and whose language we do not speak, and on terms which may very well be rather imprecise (the negotiations and terms of a journey by taxi being more mysterious than most). Yet all these are contracts; in principle, at least any of them could be brought before a court for adjudication, and if the court was called upon to do it, it would decide whether there was a contract, and what its basic terms were, by the analysis which we have just described.

What this shows is that the Contract Act, and the common law of contract more generally, provides a set of rules by which to analyse the relationship between the parties when something has gone wrong. We do not need to understand the Contract Act before we can buy our breakfast; we just do what we do. If there is a problem, if there is a disagreement about the price, or about the quality of the food, a court may start its analysis with the Contract Act: even though we did not do so, the court will.

And what will happen when it does? Take the example of an English visitor to Yangon who goes into a teashop for something to eat. The boy who fetches the tea and the snacks speaks no English, and the visitor speaks no Burmese. If the visitor is lucky, there may be a menu: an invitation to treat;⁴² if there is not, the fact that the shop is open is invitation enough. The visitor, now a customer, tries to say what she wants by sign language and smiling: a proposal to buy. The boy goes off to fetch it: acceptance of the proposal, which means that the tea shop has made a promise to sell the tea and snacks which the customer has ordered. The customer promises to pay, which is consideration for the tea and snacks, and there is therefore a contract, made between two people who did not speak the same language, and who will not really

⁴² Not a proposal to sell, for the tea shop may not have everything on its menu available for sale at all times of the day.

have understood what the other was saying. And in fact, although the contract will be between the customer and the owner of the teashop, it was not made with the owner directly, but through his employee or agent.

How, then, did the law arrive at the conclusion that there was a contract between the parties? The answer is that there just has to be a contract in a case like this, and if necessary the facts can be fitted into the slots which go to show that a contract was made. Insofar as there was communication, it was done not so much by words but by body language – so there was a common language after all, even though it was not a sophisticated language – and by this means the agreement was made. It was true that there was no discussion of the actual price, but the court will say that there was an agreement on price: although the parties did not negotiate the numbers, and although the customer may have had no idea what the right numbers were, it was obvious that the customer agreed to pay the usual price, and that no words were needed to communicate this: in some circumstances, actions speak louder than words.

This teaches us two things, in particular, which we should remember. The first is that the making of contracts does not require any knowledge of the Contract Act, and does not require clear and precise words, or anything like that. Neither does it require any formality, such as writing or signature. The question for the court will be whether it appeared that there was enough of an agreement between the parties, or enough of an agreement for the court to explain what was said without words and to find a contract as a result. The question is, ‘does there appear to have been enough of a proposal?’, ‘does there appear to have been enough of an acceptance?’, and so on. The law is not so concerned with what one party privately thought but what that party appeared to be communicating, saying, to the other.

Suppose there were to have been a disagreement as to the price, and that the customer were to say, perfectly correctly, that there was been no mention of the price (or that the prices were written in Burmese script, which she did not understand and could not have agreed to), and that there was therefore no contract. The court will say that there was a contract, and if the price is disputed, it will be (or will have been) the usual price for what the customer ordered, whether the customer knew what that was or not. She is bound to pay, and this will be the figure. Suppose, to put things the other way around, the tea shop owner says that the customer was told, in Burmese, that the price would not be 1000 kyats, but 10,000 kyats, and that the customer did not object. This will not lead to the conclusion that there was a contract to pay 10,000 kyats for tea and snacks. One possible reason will be that owner caused, and knew that he had caused, the customer to be mistaken as to the price. As we shall see, Section 18(3) of the Act will mean that if there is a contract it is a voidable contract: a possible but inconvenient answer after the tea has been drunk and food eaten. A better reason will be that the offer will be interpreted as an offer to sell at the usual price unless the seller has made it clear to the customer that the price is not the usual one and the customer has equally clearly agreed to it. In short, courts decide whether a contract was formed, and determine the terms of that contract, from the perspective of the reasonable bystander, adopting an objective point of view in relation to the dealing of the parties.

So for another example; if I attend an auction, and bid for Lot 1 when I had become muddled and had thought that the auctioneer was selling Lot 2, I will be bound to complete the purchase of Lot 1 if the auctioneer accepts my bid as the winning bid. The fact that I actually and genuinely intended to bid for another Lot, and can show evidence which suggests that this is really true, will be irrelevant.⁴³ The auctioneer invited bids for Lot 1; I made a bid in response to this invitation, and this bid was accepted. The auctioneer's promise to sell to the highest bidder, and my promise to pay, are good consideration for each other and, as any reasonable observer of the event would confirm, we have concluded a contract.

The second general point, which will now be obvious, is that there will often be gaps in the parties' negotiations which the court will need to fill, and will fill. The task of the court is, in practice, to try to satisfy itself that there was a contract which it can enforce; it may come to the opposite answer, but when the parties have performed what they evidently assumed was a contract, it will be very inconvenient if the court says that they were wrong. If it is clear that the parties intended to make a contract, and considered themselves to be contractually bound to each other, the law will go as far as it properly can to fill in the detail which can properly be filled. Only where there is a gap which cannot be filled by these means will the answer be that there is no agreement or no contract.⁴⁴ For example, if we appear to have agreed that you will do some work for me, but have not agreed a fee, the court will not be able to fill the gap and enforce the contract: the gap will be one which simply means that the parties had not agreed, and would not be thought by an observer to have settled on, a fee for the work. It is different from the case of the teashop where the court will be able to see an agreement to pay 'the usual price', even if this was not said, and even though the customer had no idea what the usual price may have been. It all depends on whether the term or details not precisely specified are of importance in the context of the agreement made.⁴⁵

(b) Interpretation of what the parties did agree

The parties may have used words which seem clear enough, but which, on closer inspection, may not make quite as much sense as was supposed. The question which may arise is how to interpret the terms used by the parties. In some parts of the common law world an astonishing amount of ink has been spilled on this topic; and we examine it in detail in Chapter 5. But it is convenient to make a couple of preliminary points about it at this stage as it is concerned with the precision or imprecision of communications, and its effect on the formation of contracts.

The first is that, applying the approach in other common law systems, the courts interpret what people say by asking what a reasonable person, in the position of

⁴³ And see, for comparison, Evidence Act 1872, s 95 (which deals with written contracts).

⁴⁴ The remedial consequences of this conclusion are mentioned briefly at Chapter 3.10, and again, in greater detail, at Chapter 10.2.

⁴⁵ See *DK Parekh v The Burma Sugar Co Ltd* (1948) BLR 257 (HC) (contract can be complete even if details of time and mode of delivery not specified if the parties had whole season before them and delivery could be made according to their convenience.)

listener, would take the speaker to mean. We are not really concerned to find out what the speaker did intend, but ask what a reasonable person would understand him to have meant.⁴⁶ This is one aspect of the principle of 'objectivity' which underpins much of the common law of contract.

The second is that the same objective approach applies where a contract is reduced to writing. It follows that the courts assume that the parties meant to be bound by the words interpreted according to their natural meaning given the context and purpose of the contract. When confronted by a term in a contract which suggests that 'something has gone wrong with the language', a court should put the language right. If the written contract says 'buyer' where it is obvious that it should have said 'seller', the court should correct the typographical error, even if the error was more than a slip of the typist's fingers. However, it is sometimes more difficult. Suppose the contract says that 'the buyer shall deliver' the goods which are being bought and sold. Something has clearly gone wrong with the language, for a buyer does not deliver. But what did the parties mean? Did they mean to say that the seller shall deliver? Or did they mean that the buyer should arrange for delivery? Applying the objective approach, a court may look to see whether it can work out what the parties really intended to say by reading the other terms of the contract and taking into account the context in which the contract was made which may include any usage or custom of the trade.⁴⁷ It is also conceivable that some help may be given by considering the law on implied terms. We return to these issues in Chapter 5.

2.8 Problems of formation with more complex contracts

We must mention some circumstances in which the usual analysis has to be set aside in order to make sense of the relationship between the parties.

One possible example is the very common business situation where parties each sign a written agreement. Although one may say that the first party who signs is making a proposal to the other which is then accepted when that party signs, this is somewhat unrealistic and the better view is that, because there is plainly an agreement, supported by consideration, there is no need to go through the proposal, acceptance, promise, consideration and agreement analysis. The signatures to the written document suffice to establish the contract.

As another example, suppose a sailing race is organised, and that the terms on which every participant enters the race are set out in a document issued by the organiser, intended to operate as a contract providing, for example, that each participant is freed from any liability to any other participant which would otherwise arise for causing property damage. It is easy to see that each participant enters into

⁴⁶ *Mg Shwe The v Ma E Bon* AIR 1923 Ran 128.

⁴⁷ Section 1 of the Contract Act expressly preserves 'any usage or custom of trade' that is not inconsistent with the provisions of the Act. Whether custom can be used to override the clear terms of a contract reduced to writing is unclear: see *Steel Bros & Co Ltd v Tokersee Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372.

a contractual relationship with the organiser,⁴⁸ but less easy to see that such a relationship is created between the individual participants: they do not know the name or identity of the others. Yet there must be a contract between all the participants, for otherwise every participant would be at risk of being sued by another participant whose yacht he had damaged outside the terms of the contract which may intend to place mutually beneficial limits of the liability of the participants to each other.

The practical answer has to be that the law can find a contract here. One way of doing it is to say that every participant, in entering the race, makes a proposal to every other participant to excuse them from liability for accidental damage, and that these other participants accept that proposal either by entering the race or (if they have already entered) by continuing to participate. If this looks as though it stretches the law to the point where it may break, the only answer one may give is that which was given by the Privy Council in the case we mentioned, and from which a quotation was given, at the start of this chapter. Multi-partite contracts are one of many examples in which we all know that there has to be a contract, but where we realise that we may have to work quite hard to show a court how to arrive at this conclusion.

And we should perhaps say something about the case from which that quotation was taken. It concerned a case of carriage of goods - a very expensive piece of drilling equipment - by sea from Liverpool, England, to a port in New Zealand. Contained in the contract, which was made between the owner of the equipment and the sea carrier when the equipment was put on board the ship 'Eurymedon', was a promise, made by the owner and given to the sea carrier, that the owner would not more than a year after delivery of the goods sue the sea carrier, or anyone whom the sea carrier engaged to do the unloading of the goods, for any damage done to the goods by negligence in their carriage or their unloading. Although this may seem a slightly strange thing for the owner of goods to agree to, it made commercial sense, as it allowed the sea carrier to transport the goods for a lower price than he would have had to if he faced unlimited liability.

The stevedore damaged the goods by unloading them negligently, and the unhappy owner sued the stevedore more than a year afterwards. The stevedore defended itself by pointing to the contract between the owner and the sea carrier, and the term in it which provided that the owner would not sue the stevedore after a year. The owner objected that as a matter of English law, the stevedore was not party to the contract between the owner and the sea carrier, and that the doctrine of privity of contract, which we will study separately,⁴⁹ and which may be seen *not* be part of Myanmar law, meant that the stevedore could not take advantage of a term contained in a contract to which he was not party. The stevedore therefore sought to show that there was another contract, this time between the stevedore and the owner of the goods, and that this contract contained the same provision. The problem was

⁴⁸ However, there was held to be no contract between the Rangoon Turf Club and the owners of horses in Myanmar which allowed owners to require the Club to classify their horses according to its rules: *J Chan Toon v The Stewards of the Rangoon Turf Club* (1949) BLR 327 (HC).

⁴⁹ Chapter 5.9.

that the owner had had no dealings with the stevedore, did not know who the stevedore was (and really did not care), and did not ask for anything from the stevedore; and the stevedore did not know who the owner was (and really did not care), and in any case, provided no consideration because all the stevedore did was unload the ship, which it had already agreed with the sea carrier to do.

The court held that there was a contract formed between two parties who neither knew nor much cared who the other was, and that the unloading of the cargo, which the stevedore was already bound by his contract with the sea carrier to perform, was capable of being good consideration for the owner's promise to the stevedore (even though the owner maintained that he had made no promise to anyone other than the sea carrier, and even though the stevedore had no conscious awareness that an offer had been made to it by the owner). The detailed reasoning in the case is not our particular concern, but what shines through the judgment is a clear perception by the court that all the participants in the industry had a clear interest in its coming to the conclusion that there was a contract, and a clear message that the court would go to the limits of its proper powers to find it.

It remains, however, a striking lesson: that a contract can be formed between persons who really had no intention of dealing with each other, who did not wish to deal with each other, who did not realise that they were dealing with each other; and in circumstances in which consideration appeared to have been manufactured out of thin air. As the court said: 'English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of [proposal], acceptance and consideration'. It is not surprising to discover that we have to take the same approach to the common law of contract, as set out in Myanmar in the Contract Act over 140 years ago. Not all contracts are simple and straightforward, and for those that are not, the creative use of the Contract Act to produce a commercially sensible, and modern, solution, is the path to progress and the best way to refresh and upgrade the contract law of Myanmar.

2.9 Agreements to negotiate and agreements not to negotiate

A modern phenomenon of contract law, which is all the more important in the context of large commercial agreements, is that parties who realise that their negotiations will take a long time to conclude may be uncomfortable with the rule of the common law that, unless and until there is an acceptance which takes the form of an unqualified assent to the proposal, either side may walk away from the negotiating table. That may mean that lengthy negotiations produce no contract, but it may result in something worse: that a party who learns in negotiation much - and much that may be confidential or sensitive - about the other may be able to exploit it. Indeed, the fact that A is negotiating with B does not mean that A may not also be negotiating with C, and using information gathered from one set of negotiations to help him in the other.

If the common law could do nothing to regulate, or to prevent the difficulties liable to result, from such behaviour, it would be a stain on the reputation of the common law. Fortunately, the Contract Act can be used to give effect to a number of agreements which might be helpful in these circumstances.

(a) An agreement to negotiate an agreement in good faith

The parties to a negotiation may consider making an agreement to negotiate an agreement in good faith, or to use their best endeavours to conclude an agreement. By doing so, each may seek to bind the other to negotiate in a constructive way, and to bind the other to do his best to bring the negotiations to a satisfactory conclusion. The question is whether such an agreement is capable of constituting an agreement, and if consideration is found, as it will presumably be found in the mutual promises, being enforced as a contract.

The answer to the question is not completely clear. The traditional approach of common law courts was to reject the idea that this could be seen as an agreement with contractual effect. The immediate objection is that the terms which define the obligation are vague and imprecise,⁵⁰ and are in any event contrary to the basic approach of the common law which has been to see parties in negotiation almost as though they were in a hostile relationship, each acting, and entitled to act, entirely in its own interests. How, one may ask, can there be an agreement to act in a way which is not entirely self-interested? How can parties in negotiation really promise each other that the negotiations will end in a particular, pre-ordained, outcome? How can a court be expected to assess and adjudge whether the negotiating behaviour of one of the parties amounted to good faith, or manifested an absence of good faith? Does good faith mean that a party must sometimes act against its own interests? How can a court be expected to assess what the consequences would have been if a breach of the obligation had not taken place? The questions could be multiplied, and those who consider that the common law of contract cannot tolerate such agreements do tend to multiply them; and they do have a considerable weight.

Yet there are mature legal systems which regard the principle that one must act in good faith as underpinning the whole of private law, and these systems do not appear to find difficulty in assessing whether a person has complied with the requirements of the doctrine of good faith. Most countries of the civil law family recognise a principle of this approximate kind. To ask a judge to decide whether a party had exercised good faith would not be to set him an impossible task. It may be that the standards are hard to define with mathematical precision, but that is true of many concepts used in the common law, of which 'reasonableness' is perhaps the most obvious. The problem of definition should not be seen as fatal.

There is still very little support among common lawyers for the idea that there should be a general duty of good faith required to be observed by all parties in a contractual bargaining relationship. But the present case is very different. If the parties make an agreement in express terms along the lines which we have been

⁵⁰ Contract Act, Section 29.

considering, there is no question of the law imposing on them a duty of which one or both may have been unaware; rather, the duty is freely assumed and, if it is of imprecise definition, it is the parties who made it so, and they can hardly complain. No doubt there will be cases in which it is hard to be sure whether the agreement has been performed or breached, and no doubt there will be problems in assessing any compensation due if the agreement is said to have been breached, but these all result from the law seeking to give contractual effect to an agreement which the parties chose to make and freely consented to. In those circumstances a court should take a constructive view of its role in assisting commercial relationships, and do what it thinks it may to enforce the agreement.

(b) An agreement not to negotiate with anyone else: a 'lock-out' agreement

It is possible - it is not controversial - for parties to make an agreement, with contractual effect, that neither party will negotiate or communicate with anyone else for a defined period of time. If negotiations are expected to be lengthy, and if there is felt to be a risk that others may also be keen to put themselves forward as potential counterparties, the parties to the negotiation may make a lock-out agreement, the legal effect of which is that neither will negotiate with anyone else for a defined period of time. No doubt it will be necessary for the terms of the agreement to be defined with reasonable precision.

However, an agreement not to negotiate with anyone else does not, in and of itself, mean that the negotiation with the other party must succeed, or must be conducted in good faith, or with the best endeavours of each side, and so on. In practice, then, a lock-out agreement will be more effective if accompanied by an agreement requiring the other party to negotiate in good faith; and as indicated above, as the law currently stands it is not clear whether such an agreement would be given effect by a Myanmar court.

2.10 Formation of agreements contrasted with variation of contracts already made

In this Chapter we have set out and examined the rules by which the Contract Act explains how and when a contract is formed or made, as well as some supplementary principles of common law which may also contribute to the law on formation of contracts. We should say something about the case in which the parties to a contract agree to vary the terms of their agreement and, from one point of view at least, make a new contract.

It follows from what has been said about consideration above, and in particular from the example of the person who returns a stolen ring who does not, when he does what he was already under a legal obligation to do, provide anything of value to the other party, that if I promise to you that I will do something which I am already obliged to you to do, this has no value so far as the law is concerned, and it will not

be capable of being consideration for a separate promise made by you. The analysis would, of course, be different if I were to make you a promise that I would perform a duty which I already owed to someone else: the law would accept that you obtain something which you did not have before (that is, the right to sue me for breach of contract if I fail to perform), and I assume a burden or liability by which I was previously bound (that is, the liability to be sued by you if I fail to perform). But a promise to do something which I am already bound to you to do appears to have no value.

It might be thought to follow from this that if A and B have made a contract by which B is obliged to A, then if A promises something additional to B if B performs his existing promise, B provides no consideration for A's promise of extra, and A cannot be required to perform it. Likewise, if B is indebted to A and A, realising that B cannot meet the terms of the original obligation, agrees to let him off a fraction of the obligation, B provides no consideration for A's promise to let him off; and in neither case would A be required to act in accordance with what has been promised. In each case, if one were to focus on the 'new' agreement and compare it with the old, it would fail to take effect as a contract for want of consideration. That would be the analysis in a number of common law jurisdictions; but it is not the law in Myanmar.

This is because the Contract Act proceeds on the basis that if A and B have made a contract, and then agree to vary its terms – whether this is a complex variation, in which case either side gains something and loses something, or a one-sided variation, in which case, the alteration is wholly for the benefit of one side – the result is that the new terms simply replace the old. The question of whether there is consideration for the change in obligation does not arise, for the issue which arises is not one of contractual formation, but one of agreeing to replace one set of terms with another. It is for this reason that we examine agreements to alter contracts in Chapter 6, as an aspect of the law of performance and release from performance, and not as an aspect of contractual formation or of the law of consideration.

3

Agreements which are Void from the Start and Contracts that Become Void Because of Subsequent Impossibility or Illegality

An agreement which is not enforceable by law is void; and a valid contract may become void because of supervening events

Our primary concern in this chapter is to look at the various ways in which an agreement, which appears to have been formed or arrived at in accordance with the rules set out in Sections 3 to 8 of the Contract Act, is nevertheless void. As is made clear by Section 2(g), 'An agreement not enforceable by law is said to be void'. For the purposes of this chapter, 'void' and 'without legal effect' may be treated as interchangeable.

The Contract Act distinguishes between void agreements, void contracts and voidable contracts. *Void agreements* are agreements which are void from the start and form the principal subject matter of this chapter. *Void contracts* are valid contracts which subsequently become void most obviously because of subsequent impossibility or illegality.¹ A *voidable contract* is a contract that is valid unless and until it is unmade (that is, rescinded) at the option of a party.

But that clear line between void contracts and voidable contracts is blurred because the Contract Act appears also to envisage that a voidable contract, once rescinded, becomes a void contract. In understanding the Act, it is therefore necessary to distinguish between a contract that automatically becomes void because of subsequent impossibility or illegality; and a voidable contract that becomes void at the option of the rescinding party.

Although, as a matter of strict logic, it would have been preferable to deal with contracts that become void because of subsequent events in a separate later chapter, it is convenient to include them at the end of this chapter once we have looked at void agreements. This is not least because the structure of the Act, and in particular Section 56, makes this convenient. But we will postpone to the next chapter our analysis of *voidable contracts*.

In this chapter, as we have just said, we are principally concerned with agreements which, because of some initial and fatal flaw, are, and always were, and will forever be, void. In fact, of course, if 'it' is void 'it' is not an agreement at all, so we might

¹ Contract Act, Section 56, second paragraph.

speak more accurately of supposed agreements, or (as lawyers sometimes say) putative agreements. But so long as we remember that it is not quite right to say it, the expression 'void agreement' works perfectly well to describe what we are talking about. That is to say, we will be examining the cases in which, because of a problem of the kind which we will examine in this chapter and which arose at or before the time the agreement was made, the 'thing' which would otherwise have been an agreement is, according to the Contract Act, void of legal effect. Because it is a void agreement it cannot be a valid contract.

For the purposes of this chapter the material on void agreements may be organised under eight points. The law takes the general approach that the parties may agree on any terms which they wish, but that certain kinds of agreement may be completely void, and that certain terms contained in a contract otherwise valid and effective may be void. The eight points which describe the various aspects of the law of void agreements are set out below. The ninth point of this chapter examines the case in which a contract becomes void by reason of subsequent impossibility or illegality. The tenth point makes some preliminary remarks about the consequences of an agreement being void or of a contract becoming void; and as a result the law may be organised under ten points, which are as follows:

1. Agreement void because the meaning of the agreement is too uncertain;
2. Agreement void because party not competent to contract;
3. Agreement void because both parties under mistake of essential fact;
4. Agreement void because made to do an act, or contingent on an event, which is impossible;
5. Agreement void because made without consideration;
6. Agreement void because the consideration or object of the agreement is unlawful;
7. Agreement void because made in restraint of marriage, trade, or access to the courts;
8. Agreement void because made by way of wager;
9. Contracts which become void because of subsequent impossibility or illegality;
10. Restitution of benefits conferred where an agreement is void or a contract becomes void.

3.1 Agreement void because the meaning of the agreement is too uncertain

The law can only give legal force to an agreement, and regard it as a contract, if it can be sufficiently certain that the parties agreed, and sufficiently certain what the parties actually agreed to. The law is laid down in Section 29, which provides as follows:

29. Agreements void for uncertainty. Agreements the meaning of which is not certain, or capable of being made certain, are void.

The only real question is whether a court, when the point is raised, would be able to say that, although the words used by the parties may appear at first sight to be uncertain, they can in fact be understood as being sufficiently certain for the agreement to have contractual effect, or (on the other hand) that although the words appear at first sight to be certain, in truth one cannot tell whether they bear one or another meaning. The ultimate question is whether the words used in the agreement are, or can be made, sufficiently certain for a court to be able to enforce the agreement.² Section 29 is principally concerned with words which may not be certain; it is not so directly concerned with cases in which the agreement has not been spelled out in great detail. Some illustrations may make the point.

(a) Agreements in which the words actually used may not be sufficiently certain

Let us start with an easy example. Suppose I agree to sell to a buyer '100 tons of oil', and that there is nothing to explain (or nothing which would help the reasonable bystander understand) what kind of oil was intended. Illustration (a) to Section 29 says that the agreement is void for uncertainty.

Next, let us take a slightly more difficult version of the same problem. Suppose I make an agreement to undertake some legal work on behalf of a Singapore company which requires advice on Myanmar law, and I agree with the company that my hourly rate for the work will be 'four hundred dollars per hour'. Suppose I do fifty hours of work for the company, and inform the company that I have done so. Suppose the Singapore company sends payment in the sum of 200,000 Singapore dollars; but I protest, saying that I meant four hundred US dollars per hour, and that 200,000 US dollars is a rather larger figure. We 'agreed' that the price will be 200,000 dollars, but now disagree as to what this means in actual money terms. What is the court to do? The answer must be this: that if the court concludes that it is clear enough what each party meant, but that they meant different things, the agreement which they made is void because it is no agreement at all. The consequence of this for the parties - after all, if the legal services have been provided, one would expect the Act to provide some mechanism for payment - will be mentioned as point (10) of this chapter, and discussed more fully in Chapter 10.

However, it may be possible to see beyond the immediate lack of certainty and conclude that there was agreement after all. Suppose that I make an agreement to sell you my bicycle for 20,000 kyats, but that I actually own two bicycles, and that when I hand the bicycle over to you, you object and say it is not this one, but the other one, that you agreed to buy. The starting point may be that although the words 'my bicycle' are clear enough, in a case in which the seller has two bicycles they may not be, and

² For illustration, *Swee Chwan Bee Rice Mill Co v Sukru Nahag* (1955) BLR 291 (HC) (price for provision of coolie labour implicitly agreed as the 'old rates', which were then paid without objection: agreement on price sufficiently certain).

if there were no more to be said about it, the agreement would be void. But suppose the court is told that you had taken one of the bicycles, but not the other bicycle, for a test ride, and that you had found the bicycle to be satisfactory, and that this piece of evidence shows which bicycle we were really making an agreement about. It is very likely, in these circumstances, that a court would say that the language of our agreement, which at first sight is not certain enough to be clear, can be made certain by this other information, and that as a result the parties' agreement is sufficiently certain for a court to be able to enforce it.³

What this shows is that an agreement which appears to be uncertain may, in the language of Section 29, 'be capable of being made certain'.⁴ Let us take another example, in which a Myanmar company which sells rice agrees to sell to a Singapore company a specific quantity of rice at a price of 'five hundred dollars per ton'. Let us suppose that the Myanmar company meant US dollars, but that the Singapore buyer meant Singapore dollars, which are worth only 75 US cents. If the Singapore buyer genuinely meant Singapore dollars, and the Myanmar seller meant US dollars, the court may be forced to conclude that the agreement is uncertain - the price has not, after all, been agreed - and is therefore void. But suppose the court is given evidence that dealings on the international market in rice are always conducted in US dollars, and that whether the parties are in Australia or Singapore, where the currency is called dollars, or in India or the United Kingdom, where the currency is not called dollars, contracts for import and export of rice are always priced in US dollars, and that everyone would make that assumption. The court will be able to decide that the language of 'five hundred dollars per ton', which *may* be uncertain, means 'five hundred US dollars per ton', and that the agreement is capable of being made certain.

And if we now go back to the '100 tons of oil' example which we mentioned above, if the seller is a merchant who deals only in coconut oil, the court will be able to conclude that the agreement is not void for uncertainty, for in the circumstances, 'oil' can only have meant 'coconut oil'.⁵

Now suppose the parties agree that the one will provide services to the other 'at a price to be determined by X' (a named person, or the holder of a specific office) if not agreed by the parties; the agreement is capable of being made certain, for the agreement itself contains the mechanism for its clarification.⁶ Likewise, if a fisherman makes an oral agreement to supply a quantity of fish to a restaurant on a particular day 'at market price', the court may receive evidence of the market price for that fish on that day, and treat the price as one which is capable of being made certain.⁷

In all these cases, therefore, the guiding principle is that an agreement can be considered certain if it is capable of being made certain.

A particular problem arises when parties make an agreement that they will use their best endeavours to conclude a contract in the future, or by a particular date. If

³ This would still be the case if the contract had been reduced to writing; Evidence Act 1872, s. 96 (and Illustration (a)).

⁴ *Swee Chuan Bee Rice Mill Co v Sukru Nabag* (1955) BLR 291 (HC).

⁵ Illustration (c) to Section 29.

⁶ Illustration (e) to Section 29.

⁷ It is debatable whether the same would be true if the contract had been reduced to writing; see Evidence Act, s 93.

they do not succeed in coming to such an agreement, the question may arise whether there was a contract to 'use best endeavours', and if there was, whether it was broken. As was suggested in the previous chapter,⁸ it is hard to say what a court should do. On the one hand, it may say that the precise content of an obligation to 'use best endeavours', or 'to negotiate in good faith' is impossible to define; that the language is just too imprecise for a court to be able to give a legal meaning to it, and that it is neither certain nor capable of being made certain. On the other hand, a court may say that although it could not give a full, complete and detailed definition of what 'best endeavours', or 'in good faith' means, it can still be sure that the way in which one party behaved would not satisfy the meaning of the term, whatever it actually meant. It may therefore find that the agreement is capable of being made certain, because 'certain' in this context means 'certain enough for the court to enforce it in this case'.

(b) Agreements in which the parties do not specify all the terms or details

Of course, parties who make a contract do not usually agree and spell out all the terms of their agreement. If they agree to sell and buy goods, they will usually specify the goods and the price, will often specify the date and place of delivery and will sometimes specify the place of payment. If a contract is made in a shop or in the market, it is likely to be very short of detail. By comparison with contracts in many other countries of the common law world, contracts made in Myanmar are very short, and many of the issues which would be spelled out in writing in a contract made in England - for example, an English contract of employment is often in a very lengthy document, but in Myanmar the document is usually rather short - are not specified in the contract in Myanmar.

This shortness in drafting or expression, however, does not mean that the agreements are void because their (full) meaning is not certain, even though the details which a court will need are not spelled out in their entirety by the parties. In some contexts - the sale of goods is the best-known example - the law provides a set of supplementary terms which will be included in (or imposed onto) the contract if it is otherwise silent: the result is that many of the terms of the contract are imposed by law by statutes such as the Sale of Goods Act 1930, and as a result there is no problem of uncertainty. In other contexts, the answer to a question may not be found in the express words of the contract, but in the 'usage or custom of trade' which Section 1 of the Contract Act preserves. The question of the precise nature of the duties owed by an employee to his employer, or by the employer to the employee, may be found in unwritten law to which the court is permitted under the Act to turn. After all, the main purpose of Section 29 is to deal with the case in which the words used by the parties are not certain enough to be enforced by a court, and not capable of being made certain enough. It is not so obviously intended to apply to a case in which the contract appears to contain gaps or silences between words which are clear enough to be enforced.

⁸ Chapter 2.9.

In most other systems of the common law world, the problems of contracts which do not appear to contain all the detail which may be needed by a court are solved by a general rule that terms may be ‘implied’ into a contract: not only by statute (the Sale of Goods Act 1930 implies terms into a contract, and these terms may then answer questions which may arise), but also by reference to general principles of common law. The law on the implication of terms into contracts is a part of the exercise of identifying the terms and meaning of a contract, and for this reason we deal with it in Chapter 5.

3.2 Agreement void because party not competent to contract

An agreement cannot be regarded as a contract if one or both of the parties lacked capacity to make the contract. The general statement in Section 10, which requires that the parties be competent to contract, is amplified in Sections 11 and 12:

11. Who are competent to contract. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes of contracting. A person is said to be of sound mind for the purpose of making a contract if, at the time he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

The Contract Act does not say in express terms that an agreement, involving a party or parties who are not competent to contract, is a void agreement.⁹ But that appears to be the most obvious interpretation of the Act and it is the one that, as we shall see, the cases have tended to adopt.

In order to understand the rules about contractual capacity, it is convenient to deal with individuals, and then with corporations.

(a) Individuals

In modern commercial law, the problems which arise when agreements are made by children are rarely encountered; the age of majority is explained in the Majority Act 1875,¹⁰ and in most cases, is attained at the age of 18.¹¹

⁹ It would have been possible, for example, for the law to provide that an agreement made by a person without capacity may be ratified and given legal effect when that person acquires or reacquires capacity. However, if the agreement is wholly void, as the law in Myanmar appears to be, this is not possible.

¹⁰ *Maung Tun Aung v Ma E Kyi* AIR 1936 Ran 212, (1936) ILR 14 Ran 215; *Ma Pwa Kywe v Maung Hmat Gyi* (1938) RLR 667, AIR 1939 Ran 86, (1938) ILR 16 Ran 667.

¹¹ An adult does not lose contractual capacity by becoming a Buddhist monk, even though principles of Buddhist conduct would indicate that such worldly contracts are not to be made: *U Pyinnya v Maung Law* AIR 1929 Ran 354, (1929) ILR 7 Ran 677.

The problems which arise when an adult who is 'of unsound mind' makes an agreement are similarly rare.¹² For this reason, although we need to notice the effect of Sections 11 and 12, this aspect of their operation is not of great practical importance. It might be thought that the requirement that a party to a contract be capable of understanding the contract and of forming a rational judgment as to its effect upon his interests is a more substantial one. But it probably does not add much. It cannot be taken to mean that, unless a contracting party could have explained the contract and its effect upon him to an intelligent bystander, the party is not of sound mind and does not have capacity. We all make contracts which we do not really understand, and it is not unusual for a person who has made a contract to discover that it has an effect on her interests which she did not recognise. If the law were interpreted in that sense, it would make the law uncertain and unpredictable. The better way to understand Section 12 is that a person is of sound mind if she has a general ability to understand the main effect of a contract, and that a party who seeks to argue that she was not of sound mind, and therefore not bound by a contract, will have to persuade the court that she was incapable of understanding anything at all.

Having said that, there are always cases – some of which find their way into the press – of individuals making contracts in circumstances in which they had no idea about the effect it would have on their interests. For example, the poorly educated rural farmer who signs a contract which allows the other party to acquire his land for next to nothing may very well say, and truthfully, that he did not understand the contract or the effect it would have on his interests. Is that enough to establish that he was not of sound mind? It seems strange to say so, when the truth is that he was a man of sound mind but limited experience, and who failed to see that advantage was being taken of him by another. In such cases, the proper analysis may be that this is a case of undue influence,¹³ and not one of contractual incapacity through lack of sound mind.

However, the Act provides that a person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. According to Illustration (b), to Section 12, this applies to a person who is so delirious with fever, or intoxicated, that he cannot understand the terms of a contract or its effect upon him. If a temporary inability to understand the terms of effect of a contract means that the person is not of sound mind, one may wonder whether the same view might not be taken in the case of a person whose inability is not temporary but inherent. But no further guidance is found in the Act.

A person who makes a contract in circumstances in which he is not of the age of the majority, or is of that age but is not of sound mind, makes an agreement which is void. It follows that a minor cannot make a contract to marry.¹⁴ In the particular case of agreements made by persons under the age of majority, there had once been a view that these agreements were contracts voidable at the option of the child,¹⁵ but

¹² But see *U Aung Ya v Ma E Mai* AIR 1932 Ran 24 (agreement made during lucid interval valid).

¹³ Chapter 4.5, below.

¹⁴ *Ma Pwa Kyue v Maung Hmat Gyi* (1938) RLR 667, AIR 1939 Ran 86, (1938) ILR 16 Ran 667, *U Daw Na v U Myat San* [1942] RLR 21.

¹⁵ *Nga Po Tin v Ma Si* (1897-1901) 2 UBR 313.

the later, and better, view was that the agreements were simply void;¹⁶ and that is also true for the case in which the child has fraudulently lied about its age. It follows that there is no possibility of such agreements being ratified once the minor reaches the age of majority, for there is nothing to ratify.¹⁷

(b) Companies

The capacity of an individual is a matter of age, and of the soundness of mind. In any case in which there is a risk that this capacity may be lacking, the other party to the agreement will generally be in a position to spot the potential difficulty and to do some checking before a contract is made: age and soundness of mind are generally apparent; and in the case where this is not so, the law on the supply of necessaries, which we examine in Chapter 10,¹⁸ provides some alternative protection.

But for a corporation, the extent of its capacity to contract, or the capacity of individuals to act on its behalf and bind it, can be much more difficult to ascertain. The capacity of a company – its legal power to make contracts generally, its legal power to make specific contracts, and the legal power of individuals to bind it to contracts (and the steps which the law or the company's constitutional documents required to be taken for this to be properly done) – may be undiscoverable by a party who deals with a company. A rule which provided that if a company acted without capacity, then the act is void of legal effect, cannot be satisfactory; and in this plain form it is not the law.

Company law has long understood the need for special solutions for cases in which a company has made an agreement which was not made in strict compliance with the rules of law governing the company, whether these are rules about the capacity of the corporation or the powers of officers and organs of the company.¹⁹ The original rule was that if a company makes an agreement which is beyond the legal powers of the company, as these are defined by the Companies Act 1914 and other legislation, and by the Memorandum and Articles of Association, the agreement will be void.

By contrast, if the contract was one which the company had legal power to make, but the problem was that the proper procedures required to obtain approval within the company were not fully complied with, the other party to the contract is entitled to assume that they were complied with: as is sometimes said, it is assumed that the 'indoor management' of the company was properly arranged. It would, after all, be very difficult to place on the other party the effective

¹⁶ *Kan Gaung v Mi Hla Chok* (1907) UBR 5; *Ma Hnit v Hashim Ebrahim Meter* AIR 1919 PC 129; *Doo Doo Meah v Kasim Ali* AIR 1924 Ran 288; *Khorasany v Acha* (1928) ILR 6 Ran 198; *SMARM Chettyar (Firm) v Mg Thaung Mg* AIR 1934 Ran 2; *Maung Nyi Pu v East End Films* (1939) RLR 121, AIR 1939 Ran 266, (1939) ILR 17 Ran 121.

¹⁷ *Ma Pwa Kywe v Maung Hmat Gyi* (1938) RLR 667, AIR 1939 Ran 86, (1938) ILR 16 Ran 667.

¹⁸ Chapter 10.9, below.

¹⁹ See, for the complication which may arise in analysing the degree and legal consequence of a corporation's failure to comply with the strict requirements of the law governing the corporation and the exercise of its powers, *Friedlander v The Corporation of Rangoon* (1939) RLR 454.

burden of finding out whether the company and its officers had observed the rules which governed and regulated their power to act. Company law may therefore draw a distinction between questions of capacity properly so called, and other issues which define how the company exercises the powers which the law bestows upon it; and although these are related to issues of capacity, they probably do not operate in the same way as ordinary issues of capacity, which is by rendering the agreement void if the party purporting to make it had no capacity under the law to do so.

However, the proposed Myanmar Companies Law, which was before the legislative authorities in draft form at the time of writing, will make significant changes to the law. Section 27 of the draft proposed Law states that no act of the company – which must include the making of contracts – is invalid merely because the company did not have the capacity, right, or power to do the act. And Sections 29 and 30 allow a person who deals with a company to assume – and the company is prevented from denying – that various matters of internal management and authorisation were fully complied with. This will place on a formal footing the assumptions which the common law would otherwise have needed to provide; and taken all together they mean that Section 11 of the Contract Act works rather differently in the case of a company whose capacity might be called into question.

3.3 Agreement void because both parties under mistake of essential fact

If both parties to the agreement are mistaken - that is to say, they are under the same mistaken impression - as to a matter of fact which is essential to their agreement, the agreement is void. The position is set out clearly by Section 20:

20. Agreement void where both parties are under mistake as to matter of fact. Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

The Illustrations given in relation to Section 20 are taken from well-known English case-law. If the parties agree to sell and to buy a specific cargo of goods bring carried by sea from England to Myanmar, but the day before the agreement is made, and without either party knowing it, the ship had run into trouble and the cargo had been cast away, the agreement is void.²⁰ In principle, at least, there cannot be an enforceable agreement to buy and sell non-existent goods. So also if we make an agreement to sell and buy a horse of mine but which, unknown to either of us, had died shortly before the agreement was made, the agreement will be void.²¹ So also if a land-owner purports to grant a lease of land which has already been leased to another

²⁰ Illustration (a) to Section 20.

²¹ Illustration (b) to Section 20.

and so is not available for demise.²² The agreement is to do something which is in principle possible (horses can be sold, land can be leased) but which, on the facts of the particular case, cannot be done.²³

That much is easy enough to understand: the first two Illustrations given in relation to Section 20 make the point clearly. The Section requires the court to address two questions. Is the mistake one which was made by both parties? Was this mistake about a matter of fact essential to the agreement, and not just about the value of the subject-matter of the agreement? Where Section 20 applies and is satisfied, the agreement is void. If, therefore, what the one party seeks is to have the terms of the agreement varied in some way, say because he contends that the price actually agreed to is not that which was recorded in the written contract, he will not seek to rely on Section 20, but will apply under Section 31 of the Specific Relief Act to have the written instrument recording the contract rectified.²⁴

(a) Mistake made by both parties

For Section 20 to provide the answer to the question before the court it must be said that the mistake was the mistake of both parties.²⁵ That is to say, they both believed the facts to be like this when they were like that: they both believed the cargo to be on board the ship when in fact it was not; they both believed the horse to be alive when it was not; they both believed the house to be fit for human habitation when it had been blown down by a storm or destroyed by fire, and so forth. But if only one party makes the mistake, this rule will not apply. So for example, if I sell tickets for a concert at which you believe a famous performer will take the stage, but I know that she is ill and is therefore not going to perform, the mistake is made by one party, but not by both; if I sell goods to you and you are unaware of the fact that you will have to pay customs duties which will make the contract disadvantageous for you,²⁶ but I neither know nor care what is in your mind, then in all those circumstances Section 20 does not make the agreement void. Instead, you may seek to argue that the contract is voidable by reference to Section 17 (if you consider that my silence on the particular issue was equivalent to fraud) or Section 18(3) (if you argue that I caused you to make a mistake by misrepresentation). The important thing for the purpose of Section 20 is that we both make the same mistake. Again, if I agree to sell you a painting which you believe to be an original work by a renowned artist, but which I believe to be no more than a nice picture by an unknown painter, the mistake made by you is not made also by me. In that case, Section 20 will not apply, though Sections 17 and 18 may.

²² *HC Dass v U Ngwe Gaing* (1949) BLR 625 (HC). See, for a similar point, Illustration (c) to Section 20.

²³ The case of an agreement to do something inherently impossible is dealt with under the next point.

²⁴ *U Shwe Thaing v U Kyaw Dun* AIR 1930 Ran 12. For rectification, see below.

²⁵ For consideration of the case in which the mistake is made by one party only, see below.

²⁶ *Chin Gwan & Co v Adamjee Hajee Dawood & Co* AIR 1933 Ran 97, (1933) ILR 11 Ran 201.

(b) Mistake made by both parties but one party bearing responsibility

If we make a contract for the sale and purchase of something which does not exist, the rule in Section 20 may apply. But what if I had actually promised you that the thing did exist? In a famous case from Australia, a company which carried on business salvaging ships purchased from the relevant authority the right to salvage a ship from a reef in Australian waters. However, there was no such ship: how the authority came to make this mistake is unclear, but it was certainly true that both parties were under a very fundamental mistake. However, the Australian court did not consider that the agreement was void. They took the view that the authority had given a promise that the ship was there to be salvaged, and that the salvage company was entitled to consider the agreement as valid and enforceable as a contract. The principle is clear enough, and the Contract Act will give the same answer.

The rule in Section 20 is sensible in those cases in which both parties are equally mistaken so that it would be wrong to place the burden on one or the other party, or require a buyer to pay for non-existent cargo or for a dead horse. Its basic philosophy is that if the parties are equally mistaken, and neither can be said to be at fault, the agreement is simply void and, as we shall see, Section 65 deals with any remedial consequence which follows from this. By contrast, if one of the parties has guaranteed - expressly or by implication - that the thing being bought and sold is in existence and does have the particular quality which both sides would regard as essential, the situation is different, and the party who has, in effect, given his promise may be required, by the third paragraph of Section 56, to pay compensation to the other party for loss which it sustained by reason of the promise which was made.²⁷

56... Compensation for loss through non-performance of act known to be impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any such loss which such promisee sustains through the non-performance of the promise.

The example given in Illustration (c) to Section 56 is of a man who contracts to marry a woman while he is (but she does not know that he is) already married. Any loss caused to the other by the non-performance of the promise must be compensated. This rather unlikely example stands for a broader proposition which applied to the case concerning the Australian ship. The agreement in that case was not treated by the Australian court as void, but was instead regarded as a case in which the authority had promised to the salvage company that the ship was available for recovery from the bottom of the sea; and for breach of this promise the authority was liable to pay compensation for the loss sustained by the salvage company. Section 56 would have provided the same result. The authority had promised to make the ship available for salvage and recovery. It should have known that there was no ship, and it should

²⁷ It is not clear why this principle was not referred to in *HC Dass v U Ngwe Gaing* (1949) BLR 625 (HC), for it seems that Rangoon Development Trust should have remembered that it had already leased the land to another tenant. But as the proceedings were between the two tenants, and not the Trust, it may be that the question of compensation from the Trust was not in issue in the proceedings.

have known that it was promising something impossible because there was no ship. As the salvage company did not know this, the loss it sustained in seeking to carry out a successful salvage would be recoverable in the form of compensation.

The result is that Sections 20 and 56 of the Act provide an answer that is probably clearer and more direct than that which the Australian court was required to deduce from the general principles of common law. However, Section 20 applies, and Section 56 will not apply, where the mistake is made by both parties equally, where neither has more responsibility for the mistake than the other.

(c) Mistake about fact essential to the agreement

If we are both mistaken about the existence of the cargo, or about the well-being of the horse, it is obvious that we are mistaken about a fact which is essential to the agreement. No-one would argue that this was a trivial matter, or no more than a matter of detail. There is a world of difference between a cargo which can be delivered and a cargo which cannot be because it has been wholly cast away; there is a world of difference between a horse which is alive and kicking and one which is dead: they are essentially different. There is a world of difference between land which is owned by the vendor and can be conveyed by him, and land which the vendor does not own.²⁸

(d) Mistakes which do not easily fit into this pattern

Not every fact about which the parties are mistaken is to be regarded as essential to the agreement. To take a simple example, if we both believe that the door of the house which I agree to sell to you had been painted in red when it was in fact painted in green, we both make a mistake of fact, but it could not be regarded as a mistake which was essential to the agreement; and this will be the position, even if you, for reasons of your own, happen to regard it as really, really important. The mistake is not one which, objectively viewed, could be regarded as essential to the agreement. The idea that we assess the importance of the fact about which the mistake was made objectively - we ask whether a reasonable man would have considered it to be essential to the agreement - is not stated in Section 20 itself, but it must be assumed to be correct in the interests of contractual certainty.

And some cases will fall, rather awkwardly, between the two. Suppose I agree to grant you a lease of a building which I own. We both know that you intend to use it to open a restaurant, and we both believe that there is no reason why you cannot do this. But suppose that a week earlier, the land next door had been sold to a company which was going to use it for a noisy or smelly industrial process, and that when you discover this you argue that Section 20 applies and the agreement is void. The mis-

²⁸ *Daw Ohn Sein v U Ba Tint* (1970) BLR 43 (CC). But if the mistake is as to title to a small part of the lands sold and bought, the purchaser who still gets over 90% of what he contracted for gets substantially what he bargained for, and the mistake will not be fundamental enough for Section 20 to apply: *U Pan v Maung Pa Tu* AIR 1927 Ran 90. Compensation can be ordered for the loss under Specific Relief Act, s 14.

take which we both make is that the neighbours will not make it much more difficult to run a food business in the building which I lease to you. Have we both made a mistake which is essential to the agreement? You may say yes: that the entire point of the agreement was to take premises in which a successful restaurant could be run. I may say that, although I was aware of the purpose which you had in mind, as far as I was concerned, it did not matter to me whether you used the building for one purpose or another: all I was interested in was the rent you agreed to pay. The only real answer to a case like this is that the question whether the mistaken belief - which each party held, but which they may have evaluated or assessed in different ways - was essential to the agreement is for the court to judge, and although one can easily formulate the arguments on either side, it is much harder to predict the answer the court will give. At the back of its mind it may have the question whether the mistake is so essential that the agreement should be void as a consequence, but some cases are bound to be difficult, and no amount of analysis can make them easier to answer.

(e) Mistake as to the value of the thing

A mistake is not essential, in the Section 20 sense, if it purely one as to the value of the thing, or the detailed extent of the lands.²⁹ The same idea is conveyed by the Explanation to Section 20. So, if I agree to sell you my car, and we both believe that it is worth a specific figure, and we are wrong, the agreement is not void: it does not matter whether we both thought that the value of the car was much higher, or much lower, than it actually is: it is just a mistake about value, not a mistake as to a matter of fact essential to the agreement. So also if I contract to build you a house for a fixed sum of money, but because we both believed, wrongly, that it would be possible to connect the house to the existing drains, but in fact it is necessary for you to dig new drains, the price which we agreed is significantly lower than it would have been if we had known what the work would actually require. This will also be an example of a mistake being as to the value or the cost, but not the essence, of the contract which forms the subject-matter of the agreement.

In one sense the mistake about whether the horse is alive is a mistake about its value: the difference in price between a living horse and a dead horse is, no doubt, capable of being expressed in money terms. But it is not, for the purpose of Section 20, a mistake as to the value of the horse: we know this from Illustration (b) to Section 20. What of the case in which I agree to sell you my horse, but (unknown to us both) it has recently contracted an illness which will reduce its strength, and therefore its value? Is the mistake which we both made as to the value of the horse, or is it as to something else which could be described as essential to the agreement? Reasonable people may disagree about the answer; and in the end, the only advice one can give is that the court will have to try and draw the line between mistakes which are about value and mistakes about essential facts which have an impact on value; and it will not always be easy.

²⁹ *U Pan v Maung Pa Tu* AIR 1927 Ran 90.

(f) Mistake as to the identity of the other party

A mistake will only bring the agreement within Section 20 if it was the mistake of both parties. It is obvious, then, that if one party – suppose a seller – is mistaken as to the identity of the person with whom he is dealing, then even if the identity of the buyer (suppose a celebrity or a very rich man) is the most important factor in the mind of the seller, Section 20 will not allow it to be said that the agreement was void. If the seller has been deceived about the identity of the other party, say by a deceitful impersonation, the contract may be voidable by reference to Sections 17 and 19 when he discovers his mistake, but by then, as we shall see,³⁰ it may be too late for the avoidance of the contract to be of any practical use.

This may encourage the seller to try to argue that the agreement was indeed void, but not on the ground set out in Section 20. He may say that he made his offer to sell, or proposed to sell *not* to the impersonator who was standing in his shop, *but* to the person whom he thought was there. If that is so, it was not open to acceptance by the impersonator, and there will therefore be no contract: not so much because of the mistake, but rather because there was no acceptance of a proposal to sell. It would follow that title to the property did not pass, and any disposition of it to a purchaser in good faith will *not* give that person title, as Section 29 of the Sale of Goods Act will not apply.

The really tricky question, therefore, is whether the seller made a proposal to sell to the impersonator who was present before him, and who could therefore accept it and create a voidable contract by doing so, or instead made his proposal to the imagined person who was being impersonated, who was not there and obviously did not accept it with the result that there was no agreement at all. No doubt the seller, who would prefer there to have been no agreement, rather than a voidable contract, will now say that he made the proposal 'to' the person whom he thought was present, and not to the impersonator who was present; but this is not really convincing: the truth is that he intended to do both, as he thought the two possible buyers, who we know to have been different, were one and the same. The best that can be said is that the court will have to decide, on all the evidence, which one of these two people the proposal was addressed to. That seems to be a matter of fact, and the court will have to decide on the basis of the evidence given in the individual case: if the judge asks the right question, there is no reason to question the answer which he or she gives to it.

3.4 Agreement void because to do an act, or contingent on an event, which is impossible

There are two further cases of agreements being void on account of impossibility which are found elsewhere in the Act; it is convenient to deal with them here.

³⁰ Chapter 4.9, below.

(a) Agreements to do an act impossible in itself

The first paragraph of the three paragraphs which comprise Section 56 provides as follows:

56. Agreement to do impossible act void. An agreement to do an act impossible in itself is void.

At this point of the chapter on void agreements we are concerned only with that first paragraph of Section 56. This explains that an agreement is void if it was to do something inherently impossible: it establishes a rule which is much narrower than may be supposed; the third paragraph, not reproduced here, deals with the remedial consequences. The second paragraph, not reproduced here, deals with what the common law usually labels the 'frustration' of contracts, and it is examined later in this chapter under the ninth point.

The first paragraph of Section 56 is rather narrow in scope. We may first ask about its relationship to Section 20, which deals, according to the Illustrations, with a contract to sell and buy a cargo which, unknown to the parties, had been lost at sea. Why is that a case which falls under Section 20 but not Section 56? After all, a contract to sell and buy non-existent goods looks like a contract to do something which is fundamentally impossible. The answer is that the sale and purchase of the cargo is not intrinsically impossible, rather it is something which would in principle have been possible had it not been for circumstances which emerged later (but before the agreement was made).

By contrast, the first Illustration given for Section 56 is of an agreement to discover treasure by magic: an act which is utterly and completely impossible, in all circumstances. So also would an agreement to find lost property, or cure a disease, or tell the future, by magic, be void. No doubt the reason for this rule, and for this Illustration of it, is to protect people who have made agreements with those who pretend to have supernatural powers when they actually have none: the consequential question whether, when the property is not found or the illness is not cured or the future not foretold, there could be any 'compensation' for the promisee, is picked up and dealt with in Chapter 10. No doubt it is correct that there may be questions about whether a promised act is intrinsically impossible, impossible in itself; but the cases are bound to be very rare in real life, and we need not spend time thinking about them.

(b) Agreements contingent on an impossible event

Contingent contracts may become void if the event on which performance is due becomes impossible: this is an example of a valid and potentially enforceable contract becoming void at some point after its creation. But an agreement to do something which is contingent upon an event which is impossible is void as an agreement, and no question of its becoming a contract can ever arise. According to Section 36:

36. Agreement contingent on impossible events void. Contingent agreements to do or not do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement when it is made.

This is a provision of small practical significance for it is hard to see that people in their right mind would see any sense in making such an agreement (though if they wish to, the law simply ignores them). Illustration (a) given to explain this provision uses the example of an agreement to pay a sum of money if two straight lines should enclose a space, which just goes to show how unreal such cases would be if ever they arose.

3.5 Agreement void because made without consideration

The next issue to consider is whether there was consideration which is, in general, necessary to convert the agreement into a contract. The meaning of consideration was considered in the previous chapter,³¹ but for convenience of reference the general definition from Section 2(d) is repeated here:

2. Interpretation clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context...

(d) Where, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

The general requirement that there be consideration is qualified by Section 25.

25. Agreement made without consideration void unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation. An agreement made without consideration is void, unless

- (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless
- (3) it is a promise, made in writing and signed by the party to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.- Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.³²

³¹ Chapter 2.4, above.

³² On this: *Lal Mohamed v Mra Tha Aung* AIR 1915 LB 86.

Explanation 2.- An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

The separate question, whether consideration which may appear to be present is, nevertheless, insufficient to convert the agreement to a contract, which is mainly concerned with whether that consideration is lawful, is dealt with in Sections 23 and 24, which are considered under the following point (the sixth point) of this chapter.

The issue of legality laid aside, the point of departure is that an agreement without consideration is void and not legally enforceable unless the Act says otherwise;³³ and Section 25 says otherwise in three cases. What these three cases have in common is that the legislator took the view that, although there was no consideration, there was a sufficient alternative reason to treat the agreement as being legally binding, and therefore as being a contract. After all, if the principal function of the requirement of consideration is to separate agreements which should be subject to judicial enforcement from those which are not so subject, it is unsurprising that there may be a small number of cases in which the law may say that, although there is no consideration, there is an alternative, and sufficient, reason to enforce the agreement as a contract.

In the first case, an agreement is made in writing between parties who are in a close relationship, is made for reasons of natural love and affection, and is registered under the Registration Act 1909 or other legislation providing for the registration of documents. If A promises B \$10,000 because B is A's nephew and does so out of 'natural love and affection' there is no consideration for A's promise. However, if the conditions of Section 25(1) are met, which mean in effect that it is committed to writing and registered, it may be enforced by B against A.³⁴ If it is argued that the agreement is not enforceable for additional reasons, such as that there is no intention to create legal relations in a familial relationship like this, the response is that the registration formalities referred to in Section 25(1) are more than enough to show that the parties to the agreement intended it to be enforceable by the courts.

In the second case, it is supposed that a person has done something for the promisor, who then promises to compensate that person for doing it: suppose you have dug my garden, or painted my portrait, or found my lost property and returned it to me, and I then promise to pay you for the work. Or as in Illustrations (c) and (d) to Section 25: A finds B's purse and B then promises to give A 5000 kyat; or A supports B's infant son and B then promises to pay A's expenses for having done so. The agreement is a contract. These promises could not be seen as supported by consideration for the supporting acts were finished and done before the promise to pay was made. As it is said in some systems, 'Past consideration is not good consideration'. So in some systems of the common law, such a case would be treated as one in which there was

³³ *Ma Mo v Ma Set* (1926) AIR 71 (Ran).

³⁴ See Illustration (b) to Section 25.

no consideration and hence no legally binding promise unless there was a silent promise to pay for the performance before the work was done, with the later promise to pay being no more than an express articulation of that earlier, silent, promise. The Contract Act takes a much more sensible view: that if in these circumstances the work has been done and the promisor, who need not do so, then promises to pay for it, there is no good reason why his promise should not be just as enforceable as one which is supported by consideration. After all, if the promisor were to be unhappy, he could have refrained from promising to pay; any claim by the promisee would then be dealt with under Section 70 of the Act, which is considered elsewhere.³⁵

The third case arises when a written and signed promise is made to pay a debt which would otherwise be irrecoverable by reason of the Limitation Act 1909 or other statutory provision.³⁶ The reason for this is that limitation is a defence to a claim to enforce a contract which the debtor may, but need not, take. It is clear that if a suit is brought on a debt which could be defeated by a plea of limitation, but the debtor elects not to plead limitation, the creditor may proceed.³⁷ The result of this is that, if a promise is made to pay a time-barred debt which is unequivocal³⁸ and in a form which complies with Section 25(3), the promise may be accepted by words or by conduct and when this happens the result is a fresh agreement – it is not a revival of the old agreement, but the creation of a new one³⁹ – by which both sides are bound and which may thereafter be enforced despite the lack of consideration.⁴⁰

It is sometimes said that the flexibility of the doctrine of consideration means that a court can almost always discover consideration for the promise; and this seems to be a justifiable observation. Only in those few cases in which a court cannot find consideration will it be necessary to ask whether a promise may be enforceable without it; but in the final analysis, if there is no consideration, and if the promise not supported by consideration is not within any of the three sub-sections to Section 25, the agreement is not enforceable as a contract, and any effect it may have in law must be found outside the law of contract.

If consideration is present, the next question is whether there is nevertheless a question about its lawfulness. To this we now turn.

³⁵ Chapter 10.6, below.

³⁶ *Abdullakin v Maung Ne Dun* AIR 1929 Ran 240, (1929) ILR 7 Ran 292 (which also discusses whether Evidence Act s 92 prevented the party showing the real character of the consideration fixed between the parties).

³⁷ It also follows that if an agreement is made not to plead limitation, this agreement may be enforced as a contract if its object is lawful (and there is nothing unlawful about not taking a defence of limitation) and is supported by consideration.

³⁸ This will involve the interpretation of the document to ascertain whether it is a mere acknowledgment of old indebtedness of a promise to pay that debt: *The Bank of Communication v Khyin Company* (1966) BLR 255 (CC). It is not necessary that the agreement should refer in express terms to the old debt: *Smith v Heptonstall* (1938) RLR 6.

³⁹ *State Commercial Bank v U Ba Thin* (1963) BLR 375 (CC).

⁴⁰ *George Newnes Book Co (India) Ltd v KVS Iyer* (1940) RLR 377, AIR 1940 Ran 159.

3.6 Agreement void because the consideration or object of the agreement is unlawful

An agreement whose object or consideration is unlawful cannot be enforceable; the law must treat it as void. The law is set out in Sections 23 and 24, and supplementary explanation is given in Sections 57 and 58. It is convenient to read them as one:

23. What considerations and objects are lawful and what not. The consideration or object of an agreement is lawful unless it is forbidden by law; or is such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

24. Agreements void, if considerations and objects unlawful in part. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

57. Reciprocal promise to do things legal and also things illegal. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract but the second is a void agreement.

58. Alternative promise, one branch being illegal. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

The starting point of the law is that freedom of contract is a fundamental principle; and the courts have held that there is a presumption of legality, which means that a court will try, where it can, to find the contract to be lawful: a point particularly useful in relation to wagers.⁴¹ In principle the parties may agree on any terms they wish.

(a) Agreements to do something which is illegal

However, it is almost as fundamental, and almost as obvious, that a court cannot enforce an agreement to do an act which is itself forbidden by law,⁴² and cannot enforce an agreement for which the consideration said to support the promise is itself unlawful. For example, the law cannot enforce an agreement to steal another's property, or to kill another person, and even if there is consideration for the unlawful promise, the object of the agreement is unlawful and void. So also if I promise to pay you a sum of money if you kill another person: the consideration for my promise to

⁴¹ *Maung Thein Bros v Burma Produce Trading Co* (1967) BLR 307 (CC).

⁴² *ARCS Soobramonian Chetty v RMK Curpen Chetty* (1909-10) 5 LBR 182; *Mirza Hidayat Ali Beg v Nga Kyaing* (1914) UBR 13 (both concerned with contracts made to infringe the Paper Currency Act). But it is different if a law simply provides that something is inoperative or cannot be done (such as a mortgage which is covered by Transfer of Property Act, s 6(d)): *AP Joseph v EH Joseph* AIR 1927 Ran 157; *Maung Ye v MAS Firm* (1928) ILR 6 Ran 423.

pay you is unlawful. The same principle applies where the unlawfulness takes the form of fraud or of the corrupt use of personal influence to pervert the public service.⁴³ Such dramatic cases are, however, rare: at least in the sense that they rarely come to court for judicial analysis. If I enter into an agreement with another to steal or smuggle goods, it is very unlikely that I would think of going to court if the other party failed to do what he had agreed with me to do. The case in which the illegality arises or comes down after the contract was made, but was not effective at the time of contracting, is separate and distinct, though obviously related. It is considered under Section 56, below.⁴⁴

The general shape of the law on unlawful consideration and unlawful contractual objects is easy enough to state at a high level of generality, but the details of it are not fully explicable in a chapter which is concerned generally with the voidness of contracts. There are several reasons for this. The easy cases - agreements to murder or to act contrary to other provisions of the Penal Code - are only a part of the picture. There are many other statutes which prohibit certain kinds of behaviour, but which do so in a partial way.⁴⁵ For example, it is not unlawful to lend money, and so an agreement to lend money is not unlawful and may well be a valid and enforceable contract of loan. But an agreement to lend and borrow money which does not comply with the provisions of statute law relating to moneylenders⁴⁶ may be unlawful and will not create an enforceable contract: the decisive question is therefore to ascertain what, if anything, the Moneylenders Act requires, and to ascertain what it says is to happen if it is not complied with. This is because if the Act makes the loan unlawful, the agreement to loan will also be illegal and void; but if it just makes the loan unenforceable, or allows the court to alter the interest rate for which the agreement provides, that does not necessarily make the loan unlawful: indeed, if the court can adjust the interest rate, it rather suggests that the agreement is not void.

(b) Legal agreement, but associated with illegal acts

A contract may be made in circumstances in which there is an illegal element in the story, but where the contract itself is, on its face, a perfectly ordinary, lawful, contract. The proper analysis of these agreements is more difficult than when one is dealing with an agreement to do something which is, on its face, illegal.

Suppose I borrow money from a bank in order to buy narcotic drugs. The transaction concerning the drugs is certainly unlawful, but is the loan agreement also void because of its association with, or facilitation of, the transaction which it allows me to enter into? Or suppose I steal money in order to buy food: is the agreement to buy food illegal and void, on the ground that it involves the use of stolen property, namely money?

⁴³ *Maung Aung Gyi v Maung Tha Gyan* (1902-03) 2 UBR 6; and see Illustration (f) to Section 23. Contrast *George Gillespie & Co v Maung Maung* (1911-12) 6 LBR 1.

⁴⁴ See the ninth point of this chapter. But for illustration, see *SKR Cama & Co v KK Shah* AIR 1916 LB 7.

⁴⁵ For example, *KK Chakraborty v RB Rakshit* (1950) BLR 233 (SC).

⁴⁶ The most obvious is the Moneylenders Act 1945, but there may be others.

In the case of the bank which lends money, if it had no knowledge of the planned use of the money, it is difficult to see why the agreement to lend money should be void. In the case of the food-seller, all he intends to do is to sell food. If one assumes that neither the bank nor the seller has any idea of the illegality associated with the contracts they make, it would be very hard to argue that the contracts they make are illegal and void. But if the bank or the seller had known of the illegal acts associated with their contract it may be different. If it is in the circumstances illegal for them to make or perform their contract, then Section 23 will apply directly. So for example, if the bank commits the offence of abetment of a crime,⁴⁷ or the food seller the offence of receiving stolen property,⁴⁸ the contract they make will be ineffective because the agreement will be void. But if it did not have the knowledge which would make its contract one which infringed the Penal Code, what then? Would enforcing the contract defeat the provisions of any law?

It is hard to know what to do in these cases of associated illegality, for there are several aspects of the problem, and their precise effect is hard to measure. There may need to be a distinction drawn between 'serious' and 'not so serious' forms of illegality: if I lend you my car, for a small payment, and I realise that you will use it in a way which will infringe the speed limit, the illegality does not seem serious enough. We may also need to ask, for example, whether the counterparty to the 'legal' transaction knew of the illegal activity which he was associating himself with and those where he did not. Yet when we have done this, and have the information which it generates, what is the consequence for the application of Section 23?

Sometimes one may be able to separate off (the common law tends to refer to this as 'severing') the illegality. This reflects the idea that an agreement, perfectly lawful when seen in isolation, should not always be unlawful merely because it is tainted by something else. The idea of severance underpins Sections 57 and 58. They mean that, where the consideration or the agreement contains legal and illegal elements, its enforceability may depend on whether it is, on a true construction, indivisible, in which case it is wholly void,⁴⁹ or severable into discrete elements, in which case the legal part may be enforced while the illegal part is simply disregarded.⁵⁰ Severance is not possible, for example, where a lender knows that money is being borrowed to facilitate the commission of a serious criminal offence.

⁴⁷ Penal Code, Sections 107 and 108 (the details of the Penal Code are outside the scope of this book.)

⁴⁸ Penal Code, Section 411.

⁴⁹ Where a single payment was made for several acts, only one (or part) of which was unlawful, but there was no basis for apportionment or severability, the agreement was wholly void: *Ma Kyin Hone v Ong Boon Hock* AIR 1937 Ran 47; *VRM Ramaswamy Chettyar v CTMN Nachiappa Chettyar* (1939) RLR 711, AIR 1940 Ran 43.

⁵⁰ See for example the Illustration to Section 58. See also *U Bo Gyi v U Kan Win* (1951) BLR 373 (HC) (the Registration Act, which provides for certain invalidity if the requirements of registration are not complied with, does not prevent action to enforce personal covenant to repay loan); *Sabir Hussain v RML Ramanathan Chettyar* (1957) BLR 172 (HC), affirming (1955) BLR 211 (HC) (creditor could enforce an express personal covenant to repay loan, even though the mortgage of land by way of security for the loan was illegal under Transfer of Property (Restriction) Act 1947). For the proposition that a mortgage does not always contain a personal covenant to repay, see *Nana Meah v Siddique Ahmed* (1951) BLR 105 (HC).

One might say that, in these situations where the agreement is lawful on its face, the criminal wrongdoing should be dealt with under the Penal Code and the agreement should be valid not void. But that is an argument that would be equally applicable even to agreements which are illegal on their face and they are clearly made void by the Contract Act. Ultimately it would appear that the only solution to a difficult issue is for the court to balance a range of factors (such as the seriousness of the wrongdoing, the knowledge of the parties, and the centrality of the wrongdoing to the agreement) in order to determine whether or not the agreement is void. We return to this idea of balancing a range of factors when we consider the closely linked issue of agreements that are opposed to public policy.

(c) Recovery of sums paid under an illegal agreement

The question of recovery of sums paid over under an agreement to which Sections 23 and 24 applies is just as problematic. We deal with this in Chapter 10 where we discuss Section 65. Suffice to say now that, where the voidness of the agreement arises from illegality, there is always a risk that an automatic right to recover payments made may undermine the very law which made the agreement illegal and void in the first place. In principle, a claim for repayment should not be allowed unless the party making the claim is no more culpable than the party from whom he claims repayment, but the analysis of the facts may be complex, and the question whether the policy of the law which made the agreement illegal in the first place will be undermined by allowing money paid over for an illegal purpose to be recovered, is not always easy to answer.⁵¹

(d) Agreement unlawful because court regards it as immoral

Section 23 expressly refers to an agreement which ‘the Court regards as immoral’. If the owner of property lets a room of the house to someone who intends to use the room for the purposes of prostitution, the letting may not be illegal under the Penal Code, but the court would be likely to regard the object of the agreement as immoral and as unlawful for that reason.⁵² Obviously the scope of what may be seen as immoral may alter over time, but the court cannot be expected to enforce an agreement which it considers to be immoral.⁵³

⁵¹ For a classic example, see *Jone Bin v A Manuel* AIR 1936 Ran 358, (1936) ILR 14 Ran 597 (money paid over by credulous plaintiff who received the ‘Spanish prisoner’ letter from a fraudster; the purpose for which the payment was made being impossible of performance and so not easily seen as illegal, even though if the facts had been as the payer assumed them to be, the agreement would have been made for an unlawful purpose.) The ‘Spanish prisoner’ scam dates back to 1588, and in one form or another it is still in use today; in more recent times it involves a foreigner who claims to have access to a huge sum of money but which just requires the assistance (and banking details) of the person to whom he has sent a semi-literate internet message. It is amazing how people still fall for such nonsense.

⁵² See (though it is case of letting for concubinage) Illustration (k) to Section 23.

⁵³ See also Illustration (j) to Section 23 (agreement by X, who is Y’s lawyer, to use X’s influence with Y for the advantage of Z, who pays X to do so. The agreement is void because it is immoral).

(e) Agreement unlawful because contrary to public policy

Linked to the last sub-heading is that Section 23 also expressly refers to an agreement which is 'opposed to public policy'. Some difficulty may arise when the objection to the lawfulness of the agreement or the consideration does not take the form of a breach of the penal law, but a breach of civil law, or a breach of moral values which are not also rules of law. The particular case of a contract or consideration, or of a term in the agreement, being contrary to public policy can be challenging, for the definition of public policy is not always easy to pin down. It has been said to be 'a loose term, and so is used in such a way as to serve the interests of one's own country',⁵⁴ but this does not really help answer the practical questions which may arise. The courts generally accept that public policy needs to be used in a restrained way, for fear that too free a use of it would damage legal certainty.⁵⁵ That too is understandable but it still leaves detailed questions in need of a detailed answer.

Some indications from decided cases can be given. An agreement which is extortionate and unconscionable may be void as being contrary to public policy if the circumstances are sufficiently extreme,⁵⁶ for it is hard to see how public policy could condone extortionate behaviour.⁵⁷ The same is true for one which offends prevailing standards of morality in Myanmar. However, some aspects of the nature of Myanmar public policy are not so easy to explain or understand; and in any event, the public policy of Myanmar is likely to have changed over the years. Myanmar underwent several radical changes in the years after independence, and this may also have meant that the public policy of Myanmar and its law also changed (and then maybe changed back again).⁵⁸ Though there are many rather old cases,⁵⁹ it is not clear how many of them would be decided the same way today.

⁵⁴ *V Ramaswamy Iyengar v SVKV Velayudhan Chettyar* (1952) BLR 25 (SC) (contract between person in Japanese-occupied Burma and person in British India not unlawful under Defence of Burma Act, so any objection to its legality had to rest on public policy. No interest of the state would be injured or impaired by allowing a person in the occupied country to have trade relations with persons in British India: indeed the opposite was the case, for such trade might help those seeking to liberate the country).

⁵⁵ Public policy was described as being an 'unruly horse' (which is taken to be a dangerous thing) in *Dhunjee Shamjee & Co State Agricultural Marketing Board* (1960) BLR 270 (HC).

⁵⁶ *Kalimuthu v Maung Tha Din* AIR 1936 Ran 491 (not extortionate, so not contrary to public policy).

⁵⁷ For the problems of cases involving an agreement not to bid against another at auction, in circumstances in which the knowledge of the parties may be uneven, their purposes unpleaded, and circumstances of the case variable, see *Ah Foke v PMA Nagappa Chetty* AIR 1918 LB 77; *Maung Sein Htin v Chee Pan Ngaw* AIR 1925 Ran 275, (1925) ILR 3 Ran 275.

⁵⁸ In the 1970s, during the period of 'People's Courts', Dr Maung Maung, Minister for Judicial Affairs, wrote, in the Foreword to the Courts Manual (Chief Court Press, Rangoon, 1973) that 'since the circumstances vary from case to case depending on social and historical factors reliance on previous rulings which were from different times should not be made. Foreign rulings should not be cited at all'. So extreme a position would make less sense today, but the point has undeniable resonance in the area of public policy.

⁵⁹ See for example *Maung Pyo v Maung Po Gyi* AIR 1919 UB 2 (marriage brokerage contract contrary to public policy); *U Teza v Ma E Gywe* AIR 1927 Ran 3, (1927) ILR 5 Ran 626; *Ko Pa Thu v Azimulla* AIR 1940 Ran 73 (agreement to give evidence at trial which, it was inferred, would be false evidence: agreement contrary to public policy). Contrast *U Pyinnya v Maung Law* AIR 1929 Ran 354, (1929) ILR 7 Ran 677 (validity of contract of sale made with Buddhist monk: not contrary to public policy despite inconsistency with Buddhist teachings). More straightforward cases, which did not contravene public policy include *Hashim Ismail Dooply v Chotalal* (1938) RLR 19, AIR 1938 Ran 11

However, the flexibility of public policy is also its strength. If we revert for a moment to the 'legal agreement associated with illegal agreement' question, considered above, it was held in an early case that a contract of loan, on its face lawful but made and known to be being made to facilitate unlawful⁶⁰ gambling, would be contrary to public policy and hence void. The explanation given was that it would be irrational to enforce a loan taken for a purpose which was (and was known to be) contrary to law.⁶¹ Though the broader issues concerning the particular case of gambling, which is not generally illegal, are more conveniently postponed until we look at wagers, this early decision would suggest that if, for example, the counterparty to the 'legal' transaction knew of⁶² the illegal agreement, and if the illegality in question were serious enough, public policy would require the 'legal' agreement to be held to be void. In many cases, if not necessarily in all, this kind of approach offers a reasonable answer to a problem which is not easy to solve by other means.

(e) Public policy and the waiver of rights

There will be other cases, on which the courts have not given guidance, in which a court will have to decide for the first time whether the object of an agreement, or a term in an agreement, is contrary to public policy. We should look at the particular case of contracts in which one party makes a promise in a contract to give up or waive rights otherwise given to him by law.

Suppose the parties make an agreement which contains a term, or several terms, by which one of the parties agrees to give up a right which the Contract Act would otherwise give him, such as the right to put an end to the contract in the event of breach which falls within Section 39, or the right to rescind the contract in accordance with Section 64, whether this is for non-performance of the contract or because his consent was not free. Will such an agreement be valid or void? Take another example: suppose a party who agrees to pay a penalty sum in the event of non-performance promises also to give up the right to invoke Section 74 of the Act to have the court decree payment of a smaller sum which would be reasonable compensation: will such an agreement be effective in law? Or suppose the parties agree that in the event of non-performance the other party waives his right to ask the court to issue a decree of specific performance: is such a term⁶³ valid, or will it be contrary to public policy and therefore void?

(agreement between a creditor and debtor in bankruptcy which did not prejudice other creditors); *Sulaiman v Tan Hwi Ya* (1929) ILR 7 Ran 800; *Lewai Khan v Goolreze Khan* (1941) RLR 316, AIR 1941 Ran 231 (both agreements to compound criminal offence); and *Dhunjee Shamjee & Co State Agricultural Marketing Board* (1960) BLR 270 (HC) (agreement for milling rice in region of Myanmar infested by insurgents not contrary to public policy, as criminal insurgency quite different from enemy occupation so no risk of strengthening 'the enemy's sinews of war').

⁶⁰ *Maung Tha Dun v Maung Su Ya* (1904-06) 2 UBR 7. It may be otherwise if the specific gambling event is not illegal.

⁶¹ *Sit Kauk v Ah Kun* (1897-1901) 2 UBR 317.

⁶² Or perhaps turned a blind eye to it.

⁶³ It is assumed that the public policy objection may be made in relation to a single term as well as to the contract as a whole. Section 58, which was set out above, does not quite say so, but it would make sense for the law to be understood in this sense.

The answer must be that the waiver of individual rights is in principle valid,⁶⁴ but subject to two points: that if the law were to consider the waiver or the term to be contrary to public policy, or if the right arises under a statute and the statute expressly⁶⁵ or by necessary implication⁶⁶ provides that the right may not be waived, then the purported waiver will be impossible in law⁶⁷ or void.⁶⁸ It may not always be easy to answer these questions, particularly the first one, but that does not mean that our analysis has failed. It is often important to identify and to ask the right question, so that we can build our analysis of the law on sound foundations.

In some cases, a statute, or a statutory scheme, may make it pretty clear that it is not possible to promise away or to contract out of the rights it confers. For example, suppose in a contract of employment a worker waives his right to be paid the minimum wage as specified by law. It is easy to see that such an agreement should be contrary to public policy, and therefore void: it cannot be right that a weak employee should be made to agree to give up a right which is conferred on him by law for his own protection, for this would undermine the law.

If the statute is not so clear, then the point of departure is that a term in a contract may waive, or purport to waive, a right given by the Contract Act or some other law. It has been held, for example, that a passenger may by contract waive her right to claim damages from an airline in the event of a breach of contract by that airline.⁶⁹ That, when one thinks about it, is a serious matter; a pretty substantial right to be given up just by a promise to do so. Perhaps, though, in the case in question it was right: those who could afford to travel by plane, at least in the 1960s, might be regarded as being in a position to make an informed choice about the terms on which they were prepared to contract.⁷⁰

But in some other cases the answer may be otherwise. Suppose a contract contains a promise by one of the parties to pay a sum by way of penalty, which exceeds the amount which a court would fix as reasonable compensation, and not to argue that the agreed sum is excessive. It is not possible to be certain about the answer, but it may well be that Section 74 of the Act states a rule which is based on public policy,

⁶⁴ *The State Agricultural Marketing Board v Aung Trading Co* (1966) BLR 252 (CC) (Additional Issue 1).

⁶⁵ Or if on its true construction its provisions are mandatory. It followed in *U Min Sein v Mohamed Shafi* (1955) BLR 130 (HC) that an agreement to allow the mortgagee to sell the mortgaged estate as soon as the mortgagor was in arrears was ineffective, because the Transfer of Property Act, s 69, which provides for sale only after three months of default was mandatory and was not liable to be waived.

⁶⁶ It was held that the rights of the ordinary pledgor under Contract Act s 176 and s 177 could not be waived by contractual agreement to do so: *Abdul Razak v U Paw Tun Aung & Co* (1948) BLR 830 (HC).

⁶⁷ An agreement to waive a right in circumstances in which the law provides that this is impossible should be void by reason of Section 56, first paragraph.

⁶⁸ One possible example would be the right to be charged a proper professional fee by an advocate: this cannot be waived by an agreement to pay a contingent (success-related) fee, for it would turn litigation into a game of chance. An agreement to waive the right to be charged a proper fee is accordingly void: *Re Messrs L and T, a Firm of Advocates* (1956) BLR 40 (HC).

⁶⁹ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC). The problem arose because the international conventions which applied to international flights had not been applied in Myanmar law to domestic flights.

⁷⁰ Though not if the passenger needed to get to places to which there was no other reasonable transport: see *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC), at 299.

namely that it is contrary to Myanmar public policy to require a defendant to pay *more* than reasonable compensation. The reason for doubt, though, is that, if there is no such objection which will prevent a contracting party promising not to claim compensation, it is hard to see why a promise to pay too much would be objectionable. In principle we need to ask whether it would damage or undermine the law if a party to the contract were able to give up a right which that law gave him. The answer will not always be obvious.

There is no need to multiply the examples: enough has been said to show that the question whether a term in an agreement is void because it is contrary to public policy is easy to ask but may be more difficult to answer. But at least we know what the right question is, and that is the start of a proper analysis. Freedom of contract is, no doubt an aspect or a reflection of Myanmar public policy, but there are other strands to public policy, and these may sometimes prevent a term in a contract which purports to waive a legal right from being given effect in law. Once the issue is framed in these terms, we may be able to agree how to find the answer we are looking for, even if there is disagreement on what that answer actually is.

3.7 Agreement void because made in restraint of marriage, trade, or access to the courts

There are certain agreements which are void simply because of what they seek to achieve, though the prohibitions are not necessarily as absolute as may be thought at first sight. They are three in number.

(a) Agreement void because made in restraint of marriage

According to Section 26:

26. Agreement in restraint of marriage void. Every agreement in restraint of marriage of any person, other than a minor, is void.

The ability of a person to enter into marriage is evidently considered to be so fundamental a freedom that an agreement which has its object to restrict or restrain a person from marrying it will be treated as void. It does not matter whether the restraint is to prevent marriage at all, or to prevent marriage to a named individual, or to prevent marriage within a certain period of time. It applies to any relationship considered as marriage as a matter of Myanmar law, and not just to monogamous marriage.⁷¹

(b) Agreement void because made in restraint of trade

According to Section 27:

⁷¹ *U Ga Zan v Hari Pru* (1913-14) 7 LBR 304.

27. Agreement in restraint of trade void. Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which good-will is sold. *Exception 1.*- One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within the specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein; Provided that such limits appear to the court reasonable, regard being had to the nature of the business.

Section 27 makes void any agreement in restraint of trade except in the case of agreements entered into on the sale of the good-will of a business.⁷² It is a surprisingly fierce rule.⁷³ One might have expected the law to provide that an unreasonable restraint of trade is void, but the position is more extreme: it does not matter how reasonable the restraint was, or whether it was - as it may well have been - in the financial interests of the parties to it. The fact that it was in restraint of trade is sufficient to render it void, no matter how rational it might otherwise have appeared to be. And if the promise to observe a restraint of trade is wholly void, there will be no consideration for whatever was offered or paid in respect of the restraint, with the consequence that Section 25 of the Act will render the entire agreement void.⁷⁴

So, for example, if parties make an agreement that in return for the provision of premises from which to trade, the trader will take his supplies of a particular commodity from, and only from, the other party to the agreement, the agreement is to that extent void. In other countries of the common law agreements of this kind are common, and the law is less restrictive. A person may enter into an agreement with an oil company or a brewery to sell only the oil company's petrol, or only the brewery's beer. Such a restriction on the freedom of the trader to trade will be upheld and enforced if it satisfies a test of reasonableness,⁷⁵ but under Section 27, such an agreement would be void.

It can sometimes be difficult to see where the limits of Section 27 are drawn. There are more ways than one of restraining a person from exercising a lawful trade or profession. The most obvious one is seen when an employee promises that if or when the employment comes to an end he will not go to work for a competitor. It appears from Section 27 that the term - commonly referred to as a 'restrictive covenant', a term in an agreement by which a person promises not to exercise a freedom to hire his services to another - will to that extent be void.

Suppose next that the restraint is a little better disguised. Suppose that a person makes an agreement with her employer according to the terms of which the employee will receive a pension after retiring from the employment, but that the agreement

⁷² It is also subject to Partnership Act 1932. Section 11 applies to restrict the activities of a person while a member of the partnership firm; and Section 36(2) provides for an outgoing partner to agree not to carry on business similar to that of the firm within a specified period or within specified limits, and that such agreement shall be enforceable to the extent that it is reasonable.

⁷³ *Mohamed v Ona Mohamed Ebrahim* AIR 1922 UB 9. The explanation is supposed to be that it was derived from American law, rather than the traditional common law, and that American law adopts a more extreme view of the inalienable right to trade than the English common law ever did.

⁷⁴ *G Hurry Krishna Pillai v M Authilchamy Ammal* AIR 1916 LB 51.

⁷⁵ It may do so if it means that the trader is able to obtain his supplies at a significantly lower price than would be case if had not entered into the agreement.

also provides that if the (former) employee takes up employment with a competitor the pension will be terminated, the agreement is (to that extent) in restraint of trade. It also appears from Section 27 that the term will be void: the provision for the termination of the pension payment is a disincentive to competition and a restraint on the freedom of a person to hire her services to another. For that reason, Section 27 considers it void. If the parties agree that one will sell a product on certain days but not others, while the other promises to sell the product on the other days, this restrains the freedom of each to trade, and the agreement is therefore void, no matter how rational it otherwise was.⁷⁶ However, there should be a difference between 'restraining from' and 'restraining in the course of' a trade or profession. If a trader makes an agreement with his supplier that he will not sell the goods obtained at a price lower than a specified figure, the agreement does not restrain him from trading; it merely restrains him in the way he carries on his trade or business; it is unlikely that this falls foul of Section 27.

It may be argued that Section 27 serves the interests of consumers by preventing some attempts by traders to divide up the market between themselves, reducing competition and by doing so driving up prices. But it would be a remarkably crude rule by which to govern or promote the competition policy of the state.

It is also obvious that the provision is controversial for other reasons and that, as Myanmar opens up to trade (and as Myanmar persons with desirable skills discover that there is a market for what they have to offer), it is likely that agreements will be drafted in a way which seeks to prevent valuable employees from leaving one employment and moving, more or less immediately, to a competitor. It is also likely that, as employers increasingly worry that an employee who leaves the employment will take with him trade secrets and confidential information,⁷⁷ and that, as Myanmar law on the protection of trade secrets and confidential information is not yet well developed, the only way to prevent the loss of this information is to try to prevent the employee taking up immediate employment with a trade competitor. Striking the right balance is not easy.

One of the few natural rights a free person really has is to resign the employment (in accordance with the terms of the contract which may restrict the circumstances in which this is done) and go to work somewhere else: take away this right and the difference between employment and slavery becomes hard to see. Section 27 lends support to the employee, or person in similar circumstances. On the other hand, the effect of an employee, or of an office-holder in a company, resigning and immediately taking up employment or self-employment elsewhere, in competition with the former employer or company may be devastating for the former employer if the employee leaves the service of his original company taking with him information which was valuable and confidential to the former employer. This need not involve his taking documents and computer files. But simply leaving with the information

⁷⁶ *Mohamed v Ona Mohamed Ebrahim* AIR 1922 UB 9. However, one justification for the decision was that it prevented suppliers agreeing (or conspiring) to drive up prices which could be charged to customers by restricting competition between suppliers.

⁷⁷ Of course he may be prevented from taking papers and similar materials, but the information which he has in his head cannot be left behind and is bound to go with him.

concerning clients, prices, methods, strategies and so on, in his head, may be something which the employer wishes to prevent being used by a rival in the trade. If the law really means that nothing can be done to prevent this, it will mean that contracts need to be governed by a law other than Myanmar law, or that Myanmar employees will not be trusted to have access to information which cannot otherwise be protected; and neither possibility is very satisfactory.

And it is not completely true that such terms in contracts have been void since 1872. An exception is made in Section 27 to cases in which the good-will of a business is sold; and a more significant exception is made in the Partnership Act 1932. There is obviously a very substantial problem if one of the partners, who has all the knowledge of the business of the partnership, could resign on Friday and start up in competition with the partnership on Monday morning. Section 36(2) of the Partnership Act provides that

36. (2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in Section 27 of the Contract Act, such agreement shall be valid if the restrictions imposed are reasonable.

In former times, the concern may have been about outgoing partners, but today the worry may be just as much over the departure of key employees. The model in Section 36(2) seems to offer a reasonable template for law reform. A sensible solution would be to allow such terms in contracts to be valid, not void, if (a) they are reasonably necessary for the protection of the interests of the original employer or other person, and (b) are a reasonable restraint on the freedom of other party to exercise his skills, trade or profession. It may be that the period of restriction could be limited to, say, a year, but the current position appears to be rather problematic, and a review of Section 27 would be timely.

(c) Agreement void because made in restraint of access to the courts

Access to the courts is a basic right; the rule of law absolutely requires that a person with a civil claim, or who seeks to defend himself against a claim, should have a right of access to a court. Any argument that an agreement restraining such access was the result of free consent or individual liberty will be rejected as inadmissible: after all, if access to the courts is excluded, it will not be possible to check whether the consent was freely given. According to Section 28:

28. **Agreements in restraint of legal proceedings void.** Every agreement by which any party thereto is restricted absolutely from enforcing his legal rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise. *Exception 1.-* This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subject shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer questions that have already arisen. *Exception 2.*- Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Section 28 shows that an agreement to oust the jurisdiction of the courts is void. The fundamental policy of the law, and in particular the concern to establish and entrench the rule of law, requires that a contract which prevents a person having access to the courts for a determination of his or her rights be absolutely void.⁷⁸ There may be many reasons why it is difficult for a person to gain access to the courts: the expense and the delay involved in court proceedings may discourage parties from seeking a judicial resolution of their disputes, but such are the problems of life. What cannot be tolerated is that a person contract to give up his or her right to bring a matter before the ordinary courts, even if there is consideration for the promise, and even if the party purporting to give up the right freely consented to doing so. If the law were otherwise, and if an agreement to give up access to the courts were in principle lawful, it would be necessary - and could be difficult - to decide whether consent to the agreement was genuinely free. If a plaintiff does not wish to bring his or her dispute before a court, that is entirely a matter for him or her.⁷⁹ But an agreement to exclude the possibility of doing so cannot be enforced; it is unlawful and void.

Despite this, an agreement to specify a single⁸⁰ court in Myanmar before which a dispute is to be brought, which had the effect of excluding or purporting to exclude the jurisdiction of a court elsewhere in Myanmar which would otherwise have had jurisdiction under Sections 9 and 20 of the Code of Civil Procedure, was held valid.⁸¹ The justification for this conclusion is that such a clause did not exclude the jurisdiction of the courts of Myanmar absolutely, but simply made a sensible allocation of jurisdiction between the courts of Myanmar.

A different problem arises when a contract term provides that all disputes are to be submitted to arbitration, perhaps in a country outside Myanmar. This might be seen as an agreement to prevent access to the courts but the courts have confirmed the validity of such agreements. The explanation was that the term was not an 'absolute' exclusion of the jurisdiction,⁸² for all it meant was that a plaintiff must go to

⁷⁸ The Limitation Act establishes the period during which the plaintiff has a right of access to the court for the enforcement of his rights; it is the curtailment of this period which is prevented by Section 28. Section 28 does not apply to a contract term which provides that after a period of time there are to be no contractual rights or benefits: a provision which extinguishes rights does not say anything about access to courts and is not caught by the prohibition in Section 28: *Rainey v The Burma Fire and Marine Insurance Co Ltd* AIR 1926 Ran 3, (1925) ILR 3 Ran 383; *Ghose v Reliance Insurance Co* AIR 1934 Ran 15, (1933) ILR 11 Ran 475.

⁷⁹ Likewise, if parties who had agreed to proceed by arbitration agree instead to proceed in court, there is nothing to stop them: *HT Abuja v Daw Hla Yin* (1967) BLR 670 (CC). This will also be the position under the Arbitration Act 2016, for parties who agreed to arbitrate may agree to not arbitrate after all.

⁸⁰ Yangon rather than Pathein.

⁸¹ *U Maung San v The American International Underwriters (Burma) Ltd* (1962) BLR 191 (CC).

⁸² But in the rare and strange case where a contract term appears to exclude access to courts absolutely, by providing that arbitration is compulsory and that there are to be no judicial proceedings, even after the arbitration has concluded, the provision may properly be considered to be void: *VIE Ismolansa Kajar v Ebrahim Ram Co Ltd* (1962) BLR 152 (CC).

arbitration before coming to the court to enforce the arbitral award.⁸³ Since that decision, the Arbitration Act 2016 has put in place a new and improved set of rules for giving effect⁸⁴ under Myanmar law to agreements to arbitrate disputes, whether this is to be done in Myanmar or overseas. Section 28 obviously cannot stand in the way of this later legislation.

There is no equivalent legislation to confirm the legal effectiveness of agreements to refer a dispute to the courts of a foreign country, and in this sense or to this extent to exclude the jurisdiction of the courts of Myanmar. Despite this, such a term was held to be valid,⁸⁵ and was liable to be enforced where the facts connecting the dispute with the foreign court were genuine and reasonable. That is not to say, of course, that a Myanmar court must always give effect to such an agreement.⁸⁶ It has a discretion and, if it appears that the plaintiff will be deprived of justice if he is required to take his case to the foreign court, the Myanmar court should certainly refuse to give effect to such an agreement. This in turn may lead to the conclusion that a jurisdiction agreement does not purport to exclude the jurisdiction of a Myanmar court, but rather provides a basis to ask the Myanmar court not to exercise the jurisdiction which it has under the Civil Procedure Code; and on that basis, Section 28 poses no obstacle to its validity. Even so, it still means that contractual agreements to refer disputes to the exclusive jurisdiction of a foreign court stand on a less strong legal basis than agreements to arbitrate in accordance with the Arbitration Act 2016.

3.8 Agreement void because made by way of wager

The basic rule is given by Section 30:

30. Agreements by way of wager void. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing. This Section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, or the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse race.

Section 294A of the Penal Code not affected. Nothing in this section shall be deemed to legalise any transaction connected with horse-racing to which the provisions of section 294A of the Penal Code apply.

⁸³ *Steel Bros & Co Ltd v YA Ganny Sons* (1965) BLR 449 (CC). The First Exception to Section 28, which makes express provision for arbitration, was understood to apply only to domestic arbitration under the Arbitration Act 1944, and so did not provide the basis for the actual decision in *Steel Bros v Ganny*.

⁸⁴ The 2016 Act specifies the limited extent to which a Myanmar court has power to not refer the parties to arbitration.

⁸⁵ *Steel Bros & Co Ltd v YA Ganny Sons* (1965) BLR 449 (CC).

⁸⁶ See further, Briggs, *Private International Law in Myanmar*, Chapter 2, points (16) and (17).

Wagering⁸⁷ is not generally illegal. An agreement by way of wager is not an illegal contract, just one which the courts will not enforce. The Contract Act does not encourage wagering, but the law does not punish those who participate in it. The Contract Act will not assist those who gamble to recover their winnings: no doubt those who consider that they have won their bet and should be paid will find means of recovering their winnings which do not involve access to the courts, and which are probably quicker and more effective than proceedings in court.

The law allows, and may in this sense encourage, a person who has paid money to a stakeholder or bookmaker to repudiate the wager and demand and recover the sum paid over before this has been applied by the stakeholder for the purpose of the bet;⁸⁸ but if the gambler demands his winnings he will be seen to have affirmed (even if the wager is void, which seems a little odd), rather than repudiated, the wager, and the right to recover the sum paid is thereby lost.⁸⁹ A loan taken out for the purposes of a wager is not tainted by illegality (for wagering is not illegal), and it is not therefore void;⁹⁰ an agreement to make a payment in order to prevent one's name being posted at the Turf Club as a scoundrel who does not pay his debts was not tainted by illegality and is not void;⁹¹ an agreement to share a lottery prize if a prize is won is collateral to the wager and is not void;⁹² and the duty of an agent to account to his principal when he receives prize money on his principal's behalf is collateral to the wager and is not void.⁹³ All this shows that there is a clear distinction between voidness resulting from illegality and voidness resulting from wagering.

(a) The meaning of 'wager'

The term 'wager' is easier to describe than to define, though 'playing a game for stakes' will do for now.⁹⁴ The starting point is usually to consider a wager to be an agreement concerning an uncertain future event the occurrence or not of which event will determine who shall pay money to the other. If I promise to pay you 1000 kyats if it rains tomorrow and you promise to pay me 2000 kyats if it does not, the agreement is by way of wager, and Section 30 renders it void. It is a form of mutual game, based on a chance of gain and loss. We could probably all agree that it is a wager. But what would one then say about a contract of insurance? In a simple contract of insurance, I promise to pay a sum of money to an insurance company, and the company promises to pay me a larger sum on the occurrence of a particular (probably unwelcome, possibly fatal) event. In other common law systems, the law exempts this kind of contract from the category of wager if I have 'an insurable interest'

⁸⁷ Which includes betting and gambling, lotteries and other games of chance.

⁸⁸ *Maung Po Saung v Maung Nin Naung* (1897-1901) UBR 329; contrast *Maung Po Hmein v Maung Aung Mya* AIR 1926 Ran 48, (1925) ILR 3 Ran 543.

⁸⁹ *Nga Hlaing v Nga Kyan Tha* (1904-06) 2 UBR 3.

⁹⁰ *MA Oothaman v Kong Yee Lone & Co* (1901-02) LBR 128. It is different where the gambling is itself made illegal by statute: *Maung Tha Dun v Maung Su Ya* (1904-06) 2 UBR 7.

⁹¹ *W Banvard v MM Moolla* AIR 1929 Ran 241, (1929) ILR 7 Ran 263.

⁹² *Khairathi v Lal Din* (1954) BLR 49 (HC).

⁹³ *Maung Po Htaik v Bramadin* AIR 1929 Ran 244, (1929) ILR 7 Ran 300.

⁹⁴ *Maung San Ya v Indian Telegraph Association* AIR 1917 LB 18 (lottery a wager).

in the event. For example, if I insure my cargo carried on a vessel, I have an interest in the property which is at risk, and the contract is not a wager. But if I have no interest - I make a contract according to which the other party will pay me a sum of money if the cargo of X, who is a complete stranger to me - is lost, the contract is a wager. If I take out a policy of insurance on my life, on terms that the insurer will make a payment to my estate or my heir if I should die within the next ten years, I have an interest in the person at risk, and the contract is not a wager. The same is true if I insure the life of my spouse or child; the same is true if I insure the life or the health of a key employee, such as my star footballer or most famous performer. However, if I make a contract according to which the other party will pay me if a named celebrity should die within the next ten years, the contract is a wager because I have no insurable interest in the life of the celebrity stranger. In truth, the notion of 'an insurable interest' is a slightly flexible one, but which serves the purpose of saving a contract from falling within the scope of Section 30. The insurance contract may be speculative, but it is not a wager.

(b) Wager distinguished from lawful speculation

In modern commerce traders may make contracts, say concerning commodities like wheat, or coffee, on the basis of bought and sold notes, from which it appears that they are speculating on the rise and fall of prices: in this sense wagering and trading have something in common. At first sight such contracts may appear to be agreements by way of wager and, if that were so, Section 30 would therefore render them void. Such contracts have been made for a long time.⁹⁵ In the case of such commodities, the courts in Myanmar have consistently held, that so long as there is an intention, which may be conditional, to deliver and take delivery of the commodity, the contract was speculative but was no wager;⁹⁶ and the same would be true so long as one of the parties was willing to perform in this sense.⁹⁷ Only where neither party had any intention to perform the contract in terms of the actual commodity was the contract liable to be seen as a wager, that is, as a contract simply to trade in, pay and receive differences in the price of the commodity at various dates in the future. Section 30 therefore requires there to be a common intention to wager. As modern – and not just modern – commerce may be said to allow those who produce, buy, and sell commodities to fix the price of the contracts they make today by reference to market prices at future dates, such contracts are not wagers, albeit that they are risky and speculative.⁹⁸ It seems that the view of the courts is that Section 30 should not be given an unduly broad scope.⁹⁹ However, the logic of the analysis of the courts is that if the contracts are made by people in suits who work for investment companies and financial organisations (rather than by those who have mills which

⁹⁵ The first reported one appears to be *Dunji Deosi v Pokermall Anandroy* AIR 1914 LB 183.

⁹⁶ *Ally Molla Industrial Corp v MA Esmail* AIR 1925 Ran 284; *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, (1936) ILR 14 Ran 347; *Taung Aun Co v Virjee Daya (Burma) Ltd* (1964) BLR 37 (CC).

⁹⁷ *Ramniranjandas Mahbai Prasad v Betai Stores* (1964) BLR 52 (CC).

⁹⁸ *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, (1936) ILR 14 Ran 347.

⁹⁹ *Maung Thein Bros v Burma Produce Trading Co* (1967) BLR 307 (CC).

produce the commodity, and by those who have warehouses in which the commodity is stored), none of whom has any intention of ever touching the actual commodity still less taking delivery of it, the contracts will be liable to be seen as contracts for the difference in prices, and nothing else, and will be liable to be found to be wagers, and void.

If this is true of back-to-back contracts concerning wheat and coffee, is the same true when the 'commodity' is currency? Or when the payments are due and calculated by reference to stock market prices? In modern markets contracts may be made in which - putting it very simply - A will pay B a sum of money if the exchange rate between two currencies, or the share index, goes above a certain figure, and B will pay A if the rate, or index, falls below that figure; and to judge from the newspapers, the sums involved can be astronomical. These contracts look very much more like wagering, for in many cases there is no serious intention to deliver anything, just to pay the sum calculated as the difference between the contracts. Indeed, in some cases there is nothing to deliver at all because the contracts are not contracts for the delivery of anything. They would certainly be vulnerable to the argument that Section 30 regarded them as agreements by way of wager.

Yet the commodity in which banks and financial institutions deal is money; and contracts which speculate in relation to money as a commodity are not fundamentally different from those which speculate in deliverable commodities such as rice and grain. There is a plausible argument that it would be bad for local business if courts and tribunals applying Myanmar law were required to strike down such agreements by reference to legal rules and assumptions which were drafted in, and perhaps reflected the moral values of, a very different time and a very different society. It would follow that such agreements may look as though they are in the nature of a wager, but they are not treated as such. Sometimes the common law just has to say that this is its answer, and leave it at that. This may be one of those occasions.

3.9 Contracts which become void because of subsequent impossibility or illegality

We have so far been dealing in this chapter with a void *agreement*. We now move to consider the separate, but related, case of a contract, formed on the basis of a perfectly valid agreement, which becomes (automatically) void.¹⁰⁰ According to the Contract Act, Section 56, second paragraph, a contract becomes void where, after the contract is made, performance becomes impossible or illegal.¹⁰¹ If a contract becomes void, in accordance with this provision, there is now no obligation to perform.

¹⁰⁰ For the distinction between an automatically void contract and a voidable contract that becomes void when rescinded at the option of a party, see above p. 48.

¹⁰¹ For example, *SKR Cama & Co v KK Shah* AIR 1916 LB 7; *JG Buchanan v SC Mall* AIR 1918 LB 46 (effect of Royal Proclamation Against Trading with the Enemy of 5 August 1914. In the latter case the contract was governed by German law, but this was held to have no relevance to the effect of the Proclamation).

56. Agreement to do impossible act. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Our present concern is with the second paragraph of Section 56: we dealt with the first paragraph above, in relation to agreements which were void from the very beginning.¹⁰² We should also notice the final provision of Section 2 of the Act, which relates to the second paragraph of Section 56, and which provides as follows:

2. Interpretation clause: In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context...

(j) a contract which ceases to be enforceable by law¹⁰³ becomes void when it ceases to be enforceable.

In many systems of the common law the effect of such supervening events is known as the frustration of the contract, but there is no need to refer to it in these terms. What is clear is that the parties to a contract cannot call upon each other to perform when an event of the kind described in the second paragraph of Section 56 has occurred.

(a) **The automatic operation of Section 56, second paragraph**

By clear contrast with cases, which we shall examine in later chapters, in which a party may have an option to rescind a voidable contract, the way in which the contract becomes void in the circumstances described by the second paragraph of Section 56 is that it happens automatically.¹⁰⁴ No option is given to the parties; no decision needs to be taken by either of them. The contract becomes void and the only remaining questions are those which explain how the law deals with the consequences of that.

It is true that the parties can regulate the position in advance by making express provision in their contract that, in the event of something happening which would otherwise make the contract void, each party shall remain bound to perform: to put the point another way, the parties can contract out of these provisions of the Act. But where this has not been done, and the second paragraph of Section 56 applies, the voidness of the contract is an automatic consequence of the event which rendered performance impossible or unlawful; it is not a matter of choice or election. It follows that the event which brings about this cataclysmic consequence must be a sufficiently serious one.

¹⁰² Chapter 3.4

¹⁰³ This means that it ceases to be enforceable as a matter of substantive law, such as by a provision of the Contract Act, rather than because of some procedural objection, such as limitation: *Mahanth Singh v U Ba Yi* (1939) RLR 358, AIR 1939 PC 110, (1939) 66 Ind App 196.

¹⁰⁴ *KM Modi v Mohamed Siddique* (1947) RLR 423; *Rangoon Telephone Co Ltd v Union of Burma* (1948) BLR 527 (HC).

The supervening event must make the performance of the contract impossible. The rule has no application to a case in which the contract has been performed but the enjoyment of the benefit obtained under the contract is prevented. So if I buy a car, and soon after the purchase the car is stolen, I cannot claim that performance of the contract is impossible, and that the contract of sale is void, for the contract has already been performed. By contrast, if I hire a car for a period of a year, the theft of the car makes it impossible for the party letting the car to me to perform his obligation to make the car available to me, and the contract may then have become void.¹⁰⁵

(b) The seriousness of the supervening occurrence

Section 56 plainly does not mean that all unexpected occurrences after the making of the contract render the contract void. Rather the occurrence must make the contractual performance impossible or unlawful. But what exactly is meant by impossibility or unlawfulness in this context? It is helpful to think of this in terms of the seriousness of the supervening occurrence. In assessing the degree of seriousness, and the impact which it has on the contract, it is helpful to deal separately with events and legislation.

(i) Supervening event

The Act illustrates subsequent impossibility with the example of an agreement to marry, after which (but before the actual marriage) one party goes mad. The contract becomes void as a result of this supervening event.¹⁰⁶ Perhaps a more practical example would be a contract made to let and hire a lorry or boat which is stolen or destroyed before the date for delivery: the contract will, in principle at least, become void.¹⁰⁷

However, if a contract merely becomes more onerous, or expensive, to perform, it will not be held to have become void.¹⁰⁸ Suppose a trader agrees to sell a quantity of Myanmar coffee beans to a Japanese importer for a fixed price, and that some months after the contract is made, unseasonal weather damages the coffee crop, with the result that the trader now has to pay three times as much to obtain the coffee beans from local farmers to fulfil his contract. This does not make the contract of sale void, for the contract to sell coffee to the Japanese importer is not impossible to perform: it may be more financially onerous, perhaps very much more onerous, to perform, but that is not the same as being impossible to perform. A similar analysis would apply where it becomes more expensive for me to perform my contract with you

¹⁰⁵ *Ah Htaung v Union of Burma* (1957) BLR 122 (HC) (grant of excise licence to produce alcoholic spirit was a completed contract, so effect of supervening insurgency did not render it void and allow the licensee to withhold payment, even though the licensee was prevented from enjoying the benefit of the licence. It might have been otherwise if the licence had required the licensee to open and run a liquor shop, but on a true construction the licensee had a privilege, not a duty, to produce alcohol).

¹⁰⁶ Illustration (b) to Section 56.

¹⁰⁷ As will be shown below, if the supervening event could have been prevented by the exercise of reasonable care on the part of the owner, the contract may not become void after all.

¹⁰⁸ *Mi Me v Nga On Gaing* (1910) UBR 22.

because the government has raised the price of gas and electricity. However if, by contrast, the trader had contracted to supply beans from a particular coffee estate in Shan state, but after the contract had been made, a cyclone destroyed all the coffee trees on the estate, it would be impossible to perform the act promised and the contract would become void.

Other cases are more difficult because, although Section 56 refers to the act becoming impossible, it may appear from the facts that that performance is partly possible: no longer entirely possible, but not completely impossible, either. If the thing to be sold and purchased is utterly destroyed, so that a contract to sell ten tons of coffee beans cannot be performed at all because there is no coffee, not even a single bean, the contract will be made void. But what if the effect of the supervening event is that five tons of coffee beans are still available? Does one say that the act for which the contract provided is impossible because it is impossible to deliver ten tons? Or is it not impossible because some of the subject matter of the contract is still available and delivery is possible in part? Sections 14 and 15 of the Specific Relief Act 1877 suggest that there is a pragmatic solution: the purchaser is entitled to seek specific performance of so much of the contract as can be performed, on condition that the purchaser relinquish all claim in respect of the amount undelivered.

Suppose I make a contract to hire the public rooms of a hotel for the purpose of a business meeting but that the day before the meeting is to start a fire (we shall assume that the fire was not the fault of the hotel) destroys one of the rooms, though leaving the other two intact. I may wish to argue that the hotel is in breach of its contract by failing to provide the rooms which I had booked and it had promised, but the hotel may seek to defend the claim by arguing that the fire made it impossible for the hotel to perform the act it had promised to perform, with the result that the contract has become void. Such cases are always difficult, because each side of the argument has something to be said for it. If the contract had provided for an individual fee for each separate room, it might be possible to treat the contract as though it were three separate contracts but, where this is not possible, the answer to this question is hard to see. Illustration (e) to Section 56 might be taken to indicate that the contract is valid as far as it can still be performed, and void only to the extent that it cannot be performed,¹⁰⁹ but this is not an easy solution to accept. It may be better to say that if performance were still required, the obligation performed would be substantially different to the one which was undertaken at the outset and that, for this reason, the contract is void.¹¹⁰

The courts have sometimes chosen a form of words to serve as a test of what is required, such as the event 'striking at the root of the contract',¹¹¹ or it being 'practically

¹⁰⁹ *Rangoon Telephone Co Ltd v Union of Burma* (1948) BLR 527 (HC).

¹¹⁰ Cf *Mohamed Ismail v The King* (1940) RLR 468, AIR 1940 Ran 252 (contract to serve as seaman signed in times of peace became void when the outbreak of war made seamanship, though technically still possible, a far more hazardous exercise).

¹¹¹ *Rangoon Telephone Co Ltd v Union of Burma* (1948) BLR 527 (HC); *Maung Kyaw Nyein v Maung Kyaw Kyaw* (1957) BLR 266 (HC) (holding also that the doctrine could apply to leases): the latter decision may in this respect be a little more open to finding a lease to be rendered void than was allowed in *Daw Pu v Ko Don* (1955) BLR 33 (HC) (holding that dispossession by communist insurgency did not frustrate lease because it would only be temporary).

impossible to perform'. The broad question is whether the supervening event is serious enough for the law to consider the contract to have become void. If, therefore, the event strikes at the root of the contract, and is quite outside what the parties contemplated when they made the agreement, it is likely that Section 56 will apply;¹¹² if the common object of the parties has been defeated, Section 56 may be applied.¹¹³ But the test is easier to frame than it is to apply.

(ii) Supervening illegality

Let us return to our example of the Myanmar trader who has contracted to sell coffee to a Japanese importer. If, after the contract was made, the legislative authorities in Myanmar¹¹⁴ were to prohibit the export of coffee, the contract would become void. A contract to do an act which has been made unlawful to perform becomes void.¹¹⁵ There is a clear parallel between subsequent impossibility and subsequent unlawfulness: in each situation the performance contracted may be said to be impossible whether physically or legally.

However, supervening illegality may be more difficult to deal with than supervening physical impossibility, for something which is made illegal today may be made legal again tomorrow. Suppose a contract is made for the export of rice from Myanmar to a purchaser overseas, but that disastrous weather causes Myanmar to prohibit the export of rice. Of course, no-one can foretell the future, but it is realistic to predict that the prohibition will be temporary, and that when the weather gets back to normal, the prohibition will be lifted.¹¹⁶ In those circumstances, does Section 56 apply?

The answer must depend, at least to begin with, on the interpretation of the contract. If the contract provides for delivery by a certain date, and it appears that this will be impossible because it will be unlawful, the contract will be made void. If, however, although the date for delivery was stated in the contract it cannot be said that time was of the essence of the contract - in other words, that it was a contract to deliver rice, rather than to deliver rice on or before a certain date and that being even a day late would defeat the purpose of the contract - the supervening illegality may not make the contract void, though it would provide the seller with a lawful excuse

¹¹² *Rangoon Telephone Co Ltd v Union of Burma* (1948) BLR 527 (HC). The further conclusion of the court, that when the event meant the contract became void, the arbitration clause in it also became void would now be considered to be inconsistent with the Arbitration Act 2016 (though a provision of that Act implementing a principle of severability of the arbitration agreement from the substantive contract is not evident).

¹¹³ *U Than Tin v M Ba Ba* (1953) BLR 9 (SC).

¹¹⁴ The possible effect of legislation in Japan banning the import of coffee beans from Myanmar raises a question of private international law, which is dealt with in Briggs, *Private International Law in Myanmar*, Chapter 5, point (46)(d).

¹¹⁵ *U Than Tin v M Ba Ba* (1953) BLR 9 (SC) (import of oil). See also Illustration (d) to Section 56 (contract to take delivery of cargo at a port in a country which is now at war with Myanmar: contract becomes void).

¹¹⁶ *Hwe Ngwe Chew v The Official Receiver, High Court* (1959) BLR 12 (HC) (on whether the Urban Rent Control Act, which was enacted as a temporary measure which could be extended, rendered the contract void, held not).

for non-delivery on the date specified in the contract. So also with a contract for the carriage of goods by sea in circumstances in which it becomes impossible for the ship to take the course intended, say because an outbreak of war.¹¹⁷ If the contract had provided specifically for carriage by that route and no other, it would become void. If it did not, but the cargo was perishable and could only be delivered if that route were taken, then again the contract will have become void. But if the contract was not specific as to the route to be taken, it is unlikely that the supervening event will be held to make the contract void.

It follows in cases of supervening illegality that care is needed to compare the precise terms of the promises with the precise extent of the illegality which has supervened. If the law which has supervened, which appears at first sight to be broad and general in effect, does not actually prevent the lawful performance of the promise, the contract will not be affected by illegality and will not become void.¹¹⁸

There is a further difficulty where only a part of the contract is rendered illegal by supervening legislation. For example, the Urban Rent Control Act 1948 did not make existing leases void – that would have been completely contrary to the purpose of the Act, as it would have made tenants homeless – but it did reduce the rent which could lawfully be charged, making it illegal to demand the sum originally agreed in the lease.¹¹⁹ Though it became illegal to perform them according to the terms which had been agreed, the leases remained valid, with the rent provision as altered by statute.¹²⁰ There is nothing wrong with saying that the original contractual rent provision became void, but it is perhaps not the best way to describe the legal result, which was that one term of a contract was altered by legislative force.

(c) Event not affecting the possibility of performing the act, but still making the promise a very different thing from what was originally expected

Suppose I make a contract with a driver who will drive me and my family, and all our luggage, to the airport before we leave on holiday, and that the driver knows that this is why I have arranged for his services. Suppose that on the day before we are to leave, the airline on which we are to fly goes out of business, and that it is now not possible for me to fly out for my holiday: does this render the contract with the driver void? It is still entirely possible for the driver to take us and our luggage to the airport, and for me to pay him his fee, but it is clear to us both that the purpose for which I made the contract with him is now a purpose which cannot be fulfilled. The wording of

¹¹⁷ For insurgency being found to be a supervening event which makes the contract void, see *U Ba Thein v Chairman, State Timber Board* (1958) BLR 373 (HC) 373; *State Timber Board v Daw Thauing Yin* (1967) BLR 99 (CC).

¹¹⁸ *VERM Krishnan Chettyar v MMK Subbiah Chettyar* (1949) BLR 56 (SC).

¹¹⁹ There are many, many examples of the point being made: see for one, *Ko Than Nyunt v Maung Khin Myint* (1951) BLR 124 (HC).

¹²⁰ The court must have considered that the supervening illegality did not bring the case within the second paragraph of Section 56. The reason must have been that the supervening legislation was not intended to make the original leases void, and its effect was understood accordingly.

Section 56 does not make it completely clear whether the contract is now void and the true answer under Myanmar law cannot be confidently stated.

However, in a case in which seamen had signed articles of agreement to work on board a merchant ship, but then the outbreak of war meant that the ship was liable to be a target of enemy action, the court accepted that although the seamen and the ship could still sail, the circumstances of the contract were so very changed that it was really not the same contract at all, and it was to be regarded as having become void.¹²¹ The court did not quite put it in these terms, but it was saying, in effect, that it would be just too harsh to interpret the promise of the seamen as one to work on board the vessel in peacetime and in war. And in effect, this is the basis on which a court decides whether a contract, still capable of being performed, should be held to have become void on the ground that circumstances have changed so dramatically that neither side should be expected to perform as though nothing had changed.

(d) Responsibility or blame for the supervening event

According to the second paragraph of Section 56, if the contract becomes unlawful because of something which the promisor 'could not prevent', it does not become void. In fact, the drafting of Section 56 is very curious in speaking of an event which the promisor could not prevent only in relation to supervening unlawfulness, but at this point we simply have to read Section 56 as it should have been written so that the same point applies to subsequent impossibility as it does to subsequent unlawfulness. So if I make a contract to let my house to a tenant, or to sell my car to a buyer, the contract does not become void if I set fire to the house, or sell the car to a third party, before the contract of letting or sale is due to be performed; the same is true if the house is broken into and burned because I did not have proper security, or the car is stolen because I failed to lock the doors when I parked it. In all these cases it may be true that it is no longer possible for me to perform the act which I promised to perform, but that is because of my own fault. That will not relieve me of the obligation of performing, or of paying compensation for failure to perform.

A related problem may arise if my business is the letting of machinery and equipment. Suppose I have two specialist earth-moving machines, which we may call M1 and M2. Suppose I make contracts of letting and hiring with two clients, A and B, and each contract provides that I will deliver 'either M1 or M2' to the client. Suppose that M1 is damaged beyond immediate repair while it is let to a previous hirer, with the consequence that although I can deliver M2 to client A, I cannot provide a machine to client B. In these circumstances I cannot argue that the contract with client B has become void. It is not impossible for me to perform the promise in my contract with client B, because I still have 'either M1 or M2'. The reason I am unable to perform my contract with client B is because I made a contract with client A which, if

¹²¹ *Mohamed Ismail v The King* (1940) RLR 468, AIR 1940 Ran 252 (outbreak of war made going to sea as seaman a significantly different thing, and the contract became void, even if the risk of war had been foreseen when the articles of agreement were signed. The case arose as a criminal prosecution under Merchant Shipping Act, s 100; the fact that the contracts became void meant that an element of the criminal charge could not be established).

I choose to perform it, will mean that I am also choosing not to perform the contract with client B. In short, I am in this predicament because I chose to make more contracts than I was sure I would be able to perform, and that is nobody's fault but mine. The contract with client B does not become void, and I will be liable to pay compensation unless there is a term in the contract - sometimes called a 'force majeure' clause - which allows me to excuse my failure to perform in circumstances such as these.

(e) Events which could have been, or which were, foreseen

If on its true construction the contract provides that, even if a specified future event should occur which makes performance impossible or unlawful, the contract is not rendered void but remains valid and enforceable, with compensation being recoverable for failure to perform, there will be no room for the rule in Section 56 to apply to it.¹²² A similar question will arise if the contract makes provision for its discharge in the event of 'Act of God or *vis major*' except that in this case the question will be the interpretation of these contractual words.¹²³

According to some authority, if an event occurs even though it could have been foreseen or was actually foreseen, but which is not dealt with (whether expressly or by implication) in the contract, the contract still becomes void.¹²⁴ For example, if a contract is made in circumstances in which one side or both foresee that legislation may be adopted to make it unlawful to perform the contract, the contract will still become void if and when that legislation is adopted. On the other hand, a contract for carriage by sea did not become void when there were monsoon storms at sea, for the obvious reason that, even though the contract became impossible to perform, all parties knew perfectly well of the risk of such weather in the Bay of Bengal.¹²⁵ Everything appears to depend on the court's assessment of the intentions of the parties and the question whether they allocated or assumed the risk of a predictable disastrous occurrence.

3.10 Restitution in respect of benefits conferred where an agreement is void or when a contract becomes void

Where the Contract Act provides that an agreement is void, it means that the agreement, or supposed agreement, created no legal obligations to perform, to pay, or to do any other thing. Title to goods does not pass under an agreement which is void, for there is, in law, nothing to alter or affect the title of the original owner.

¹²² *Rangoon Telephone Co Ltd v Union of Burma* (1948) BLR 527 (HC). See also the discussion above (Chapter 3.3(b)) of contracts formed on the basis of a mistake made by both parties, but in circumstances in which one party assumes responsibility (and hence liability) for the mistake: the particular circumstances may be different, but the general principle is the same.

¹²³ On which, see *The State Agricultural Marketing Board v Aung Trading Co* (1966) BLR 252 (CC).

¹²⁴ *Mohamed Ismail v The King* (1940) RLR 468, AIR 1940 Ran 252.

¹²⁵ *The State Agricultural Marketing Board v Aung Trading Co* (1966) BLR 252 (CC).

This does not mean, however, that the parties to the void agreement will not have performed the supposed obligation, or paid the sums supposed to be payable, or done the other things which they mistakenly supposed to be required by the agreement. The law therefore has to have some rules for determining whether, and in what measure, these acts should be reversed: money repaid, benefits reimbursed, property returned, and so forth. The obligation to do any of these things is not created by the contract, for there was none, so must be derived from other sources. And though it may seem obvious that everything which was handed over should be handed back, it only takes a moment to realise that the law cannot be quite so simple. For example, if I hand money to an assassin who has agreed to kill my enemy, it would be most surprising if I could recover it back by pointing to the fact that the agreement was void by reason of illegality.

Somewhat similar, albeit not identical, questions arise where a contract becomes void because of subsequent impossibility or illegality. Again one needs to deal, for example, with payments and other benefits that have passed from one party to the other under the contract. As the contract has become void, it would appear that, again, there is no valid contract to which one can turn for the remedies to deal with the benefits that have been conferred.

Section 65 of the Contract Act is a provision which specifically deals with the restitution of benefits conferred under a void agreement or a contract that has become void. It reads as follows:

65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Sections 68-72 also deal generally with restitution of benefits conferred and some of those provisions appear applicable in the context of void agreements and contracts that become void. We will defer further discussion of all these provisions until Chapter 10.

4

Contracts which are Voidable at the Option of a Party whose Consent was not Free

Although a contract has been made, if one party's consent to it was not free consent that party may have an option to rescind the contract

In this chapter we shall examine the provisions of the Contract Act which apply when the parties have formed an agreement which is enforceable by law, but which give one of the parties an option to escape from the contract on the ground that the consent which that party gave to the agreement was not free consent. In the cases which we discuss in this chapter, there was a flaw in the original making of the contract which meant that the consent of one of the parties was not free consent. The Act describes such contracts, such flawed contracts, as voidable.

The material examined in this Chapter is sharply different from what was examined in the previous chapter. In most of the cases dealt with in Chapter 3, the Act provides that there never was a contract because the agreement from which a contract would have been formed was void. It is also different from the case, also examined in Chapter 3, in which a contract, which was perfectly valid and flawless when made, becomes automatically void because of subsequent impossibility of illegality.

There are other circumstances, not examined in this chapter, in which the Act provides that a contract *becomes* voidable. The idea of 'becoming' voidable suggests that something happens after the formation of the contract (for example, a serious breach of contract) which means that one of the parties can do something which leads to the contract changing its nature and no longer being a valid contract. That contrasts with the cases in this chapter in which the contract was voidable from the very beginning,¹ because of something which happened during the process of formation of the contract. 'Is voidable' and 'becomes voidable' are different ideas.

For example, in Sections 53 and 55 the Act provides that, where there is a valid and enforceable contract made by reciprocal promises, the contract becomes voidable if one party is in breach of contract by preventing the other from performing,² or by refusing to perform his promise to do something by a particular time.³ When

¹ *Ab initio*, which is the Latin expression meaning 'from the beginning', and which is sometimes used (though not in this book) to convey the sense that the contract was voidable from the moment of its creation.

² Contract Act, Section 53.

³ Contract Act, Section 55.

those Sections talk of the contract *becoming* voidable, it is clear that the Act is using the term 'voidable' in a very different way from the meaning it has in the cases with which we are concerned in this chapter where the contract *is* voidable from the start.

Again, in Section 39 the Act talks of a party being entitled to 'put an end to the contract' for a repudiatory breach by the other party and this would appear to be identical to the idea of the contract *becoming* voidable. In Sections 39, 53 and 55, the law is not saying that there was a flaw in the contract from the very beginning, a defect in the consent of the party who has the option of rescinding the contract as a result of it. It is instead saying that the valid and enforceable contract can be stopped in its tracks if the counter-party refuses to play his part. The other party has the right to put an end to the contract, but for reasons, and with consequences, which are different from those which are examined in this Chapter. For this reason, we will look at Sections 39, 53 and 55 in the context of breach of contract and not here.

We should make one final introductory point. When it comes to the terminology in which the Act describes what the innocent party is doing when exercising the option which the Act gives in respect of a voidable contract, it will be seen that it uses three terms,⁴ which actually mean the same thing, interchangeably. In Section 19A, dealing with contracts made under undue influence, for example, it uses the verb to '*avoid*' the contract. In Section 19A as well, the Act says that a contract voidable for undue influence may be '*set aside*'. In Section 64, which deals generally with voidable contracts, whether they are voidable because there was no free consent, or become voidable because of breach, it uses the verb to '*rescind*' the contract. This is confusing, though it reflects other common law systems in which all three terms are in common use and are used interchangeably. Although one can therefore use any of these three terms, we shall tend to use the term '*rescind*' in the context of voidable contracts not least because that is the term used in relation to voidable contracts generally in Section 64.

In this chapter, therefore, we shall be concerned with the provisions of the Contract Act which explain the circumstances in which a contract is voidable from the moment of its creation. We will consider the law under ten points, which are as follows:

1. The distinction between a 'voidable' contract and a 'void' agreement;
2. The meaning of consent;
3. 'Free consent' of parties, and the issue of causation;
4. 'Coercion' which makes a contract voidable;
5. 'Undue influence' which makes a contract voidable;
6. 'Fraud' which makes a contract voidable;
7. 'Misrepresentation' which makes a contract voidable;
8. Self-induced mistakes do not make a contract voidable;
9. The consequences of a contract being voidable because consent was not free;
10. Restricting or excluding the options of the party whose consent was not free.

⁴ We have not discovered whether the translation of the Act into Myanmar language copies these three separate terms, or simply uses a single expression to cover all three cases. The Act might be easier to understand if these three verbs were all translated into the same Myanmar word or words.

4.1 The distinction between a 'voidable' contract and a 'void' agreement

We should remind ourselves of Section 2(g) and (i) of the Contract Act.

2. Interpretation clause: In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context...

(g) an agreement not enforceable by law is said to be void...

(i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not enforceable at the option of the other or others, is a voidable contract

It is clear from this, and we saw at the start of the last chapter, that the Act distinguishes between a void agreement and a voidable contract. There are several differences between a voidable contract and an agreement which is void, many of which are obvious and do not need elaboration. A few examples may, however, be helpful at this stage. Consider the case of a contract for the sale of goods which - unknown to the parties - perished before the contract was made. The agreement is void: this is said explicitly in the Illustrations to Section 20.⁵ It follows that the buyer does not have to pay the price, and that the seller is not liable to be sued for the failure to deliver the goods. Any money which has been paid in advance should be returned, for there was no legal obligation to justify its payment, and none to justify its retention.

By contrast, if you trick me into buying your car, by telling me that it has only done 10,000 miles since new, and this is not true, the contract would be voidable, and I would have an option to rescind it. However, if my wife likes the car, and wants me to keep it, I may instead obtain a sum of money from you. As we shall see, Section 19 allows me to do this. If the agreement had been void, title in the car would not have passed to me; I would not be entitled⁶ to keep the car, and the seller would be entitled to get it back in return for repayment of the price. In other words, in respect of a void agreement, each party is entitled to be put back to the position as it was prior to the purported agreement being made. But where the contract is voidable, I have an option to rescind the contract or not to rescind the contract; and if I do not rescind the contract, the car will remain mine.

Now let us take another example of a contract which is voidable: suppose I make a contract for the purchase of an item of jewellery, say a ring, from you. Suppose I pay with banknotes which are, as I know but you do not, no longer valid as currency, and that you hand over the ring to me. Suppose you discover the fraud, and try to rescind the contract; but suppose that I have already sold the ring to a person who bought it from me in good faith. In such a case we may ask ourselves: who does the ring belong to? For if the answer is that it is still yours, you may be able to bring proceedings for the tort of conversion against the person who now has possession of it. But the answer is that it now belongs to the purchaser in good faith, and her title to it cannot be disturbed. The reason for this is that the contract of sale to me was valid until it was rescinded and that, while it was valid, I had title to the ring. If I then

⁵ Chapter 3.3, above.

⁶ Unless, of course, we make a new contract of sale.

sold it to another person, she will have received a perfect title, not a voidable title. This is made clear by Section 29 of the Sale of Goods Act 1930, which says:

29. Sale by person in possession under voidable contract. Where the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Contract Act, but the contract has not been rescinded at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

If by contrast the agreement had been *void*, I would have not acquired title to the ring from you, and I could not have passed title to the ring to anyone else: in such a case, if you could locate the ring, you could recover it because it would be yours. But if I took delivery of the ring under a *voidable* contract, I will have obtained title to the ring from you; and Section 29 of the Sale of Goods Act explains that, not only can the title I obtained be passed to another, it is actually a complete title, better even than the voidable title which I had.

What all this means is that a void agreement does not alter the legal position of either of the parties, but a contract which is voidable does alter the legal position of the parties up to the point at which the innocent party exercises the option to rescind the contract. And if the innocent party decides not to exercise that option, the contract remains a valid contract. This is why one can say that a voidable contract is a valid contract. After all, unless there is a valid contract, there is nothing to rescind.

4.2 The meaning of 'consent'

The Contract Act provides that an agreement cannot become a contract unless it is made by the free consent of the parties. We will deal with the factors which mean that consent was not 'free' consent in the next point, but the general law on consent is to be found in Sections 10 and 13, which read as follows:

10. What agreements are contracts. All agreements are contracts if they are made by the free consent of parties competent to contract⁷

13. 'Consent' defined. Two or more persons are said to consent when they agree upon the same thing in the same sense.

What does it mean to 'agree upon the same thing in the same sense'?

The answer is that the parties must appear to be of one mind, at least so far as concerns the principal points of the contract. That is, the parties must appear to

⁷ The second sentence of Section 10 goes on to provide that 'Nothing contained herein shall affect any law in force in the Union of Myanmar by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents': on this, see *Lal Mohamed v Mra Tha Aung* AIR 1915 LB 86. We do not discuss this provision further in this book, for the general provisions of the Contract Act do not impose any such requirements. The special and particular contracts which are subject to such additional requirements of form are not examined here. The point is therefore mentioned only for the sake of completeness.

have agreed to deal with each other, to deal with specific subject matter which the court could identify if necessary, and on the same terms concerning price. If it appears to the court that the parties were at cross purposes, in that it is not sufficiently clear that they intended to deal with each other, or that they ‘agreed’ to buy and sell subject matter which a court could not identify or specify, there is no contract which the law can enforce. Suppose the parties have apparently agreed to the sale and purchase of a cargo of ‘cotton, *ex Peerless, Bombay*’ in circumstances in which there were two ships, each called *Peerless*, laden with cotton and arriving from Bombay. If the court is unable to discern which cargo the parties had agreed to - or, indeed, whether they had actually agreed at all - it will hold that there was no enforceable contract.⁸ For unless the court can identify the actual subject matter on which the parties appear to have agreed, it has no mechanism for deciding whether consent has been given or a contract has been formed.

An important question (although we have already hinted at its answer) is whether, when we are looking for the agreement of the parties, we are concerned with what was actually in the minds of the parties, or are instead looking only at the outward appearances. In much of the common law world, it is the latter. From this perspective, the parties are taken to consent if they appear to have consented: Section 13 would ask whether the parties appear to have agreed on the same thing in the same sense; it would not require the court to try to look into the minds of the parties. The practical advantage of judging parties by the appearances which they give, and not receiving evidence of their private and uncommunicated intentions, is very clear. It represents a principle which is fundamental to the manner in which the common law deals with questions of contractual formation as well as other issues; it is assumed in this book that it also applies in the context of Myanmar contract law.

4.3 ‘Free consent’ of parties and the issue of causation

If the parties have consented in the sense of Section 13, we next enquire into what Section 10 means by *free* consent. We are now approaching the heart of the matter, which is spelt out in Section 14:

14. ‘**Free consent**’ defined. Consent is said to be free when it is not caused by-

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

⁸ These are the essential facts of an English case, *Raffles v Wichelhaus* (1864) 2 H&C 906. The case is mentioned here only for illustrative purposes.

A party can only enforce the terms of the contract against another party if the latter party freely consented to be bound: if she did not freely consent, she has an option, a choice, to rescind the contract and to free herself from its obligations. What other choices she may have will be examined below;⁹ for now, we will concentrate on avoiding, and hence escaping from, the contract.

But before we do, we need to focus on the requirement that the four factors listed in Section 14 must have *caused* the consent of the other party to be given. Let us therefore think about the issue of causation, and about the true meaning of consent which ‘would not have been given but for the existence of’ one of the factors listed in Section 14.

(a) Causation

We can start with an easy case. Suppose that I have made a contract to sell goods to a buyer. The contract may have come into existence after I made a false statement to the buyer, but it may be that the buyer paid little attention to it. Suppose, for example, I tell the buyer that the bicycle I am selling to that person is painted blue when it is in fact painted green. In such a case I make a misrepresentation on a matter of fact, but that will not be enough to allow the buyer to rescind the contract. If I had not made this statement, the buyer, we shall suppose, would still have bought the bicycle; and if that is correct, the consent of the buyer is still *free* consent.

Now a different case: suppose I tell the buyer that the bicycle was made in Japan, when the truth is that it was made in India, where standards of manufacture are (let us assume) much lower. Suppose that the buyer says that, if she had been told that the bicycle was made in India rather than Japan, she would not have bought it, and that the court is satisfied that this is correct. In these circumstances her consent is not free because it would not have been given but for the existence of the fraud. She may, in principle, avoid the contract and get her money back.

Now suppose a third case, in which I tell the buyer that the bicycle is two years old, when it is actually four years old. Suppose the buyer, who believes that it is two years old, pays me 20,000 kyats for it, but that if he had known the truth, that the bicycle was actually four years old, he would still have been willing to buy it, but this time only for 10,000 kyats. In this case the seller may say that the buyer would still have bought the bicycle, and may say that the buyer’s consent was not affected by the fraud. But this is not the question which the law requires us to ask. The true question is whether the buyer would have made *this* contract: that is, to buy this bicycle for 20,000 kyats, because this is the contract which he actually made. He did not contract ‘to buy a bicycle’; he contracted ‘to buy this bicycle for 20,000’. And if he had not been lied to about the age of the bicycle, he would not have entered into *this* contract, and he may therefore rescind this contract. Indeed, if the seller tries to say that the buyer would still have bought the bicycle, but at a different price, he is himself admitting that *this* contract would not have been made, and admitting that it is a contract which the buyer may rescind.

⁹ Chapter 4.9, below.

We should note one other aspect of the law of causation in this context. It is not necessary for the buyer to say (assuming that it is the task of the buyer to make the argument) that the representation, or whatever it was, was the key to his entering into the contract, the single thing on which the decision turned. Suppose the buyer in the examples given agreed to purchase the bicycle for 20,000 kyats on the basis of his or her belief that it was made in Japan and was only two years old. If the only false statement made by the seller was about the country of manufacture, the seller may contend that that statement did not cause the buyer to enter the contract, but that two things caused the buyer to enter the contract: the seller's statement *and* the buyer's belief about something which the buyer did not say; and the seller may, once again, contend that the false statement did not cause the buyer to consent. But again, this would be to ask the wrong question. Section 14 directs us to ask whether consent would have been given but for the false statement about the country of manufacture. The answer to that question is that it would not have been given. Even if the buyer relied on two things, only one of which had been put in his or her mind by the seller, the seller's statement still caused the contract to be entered into. It is quite simple, really: if the buyer had known that the statement about manufacture in Japan was not true, the buyer would not have entered into this contract, even though the buyer may have believed all manner of other things as well. The court should stick closely to the question framed by Section 14 and ask itself: if this false statement had not been made, would the buyer still have entered into this contract? That, and only that, is the way to answer the question of causation posed by Section 14.

That, then, is what is meant when Section 14 speaks of the consent being 'caused' by the coercion, undue influence, fraud, or misrepresentation.

(b) Who must cause the consent to be given?

The Contract Act does not deal with the point expressly, but it may be necessary to consider who committed the fraud or made the misrepresentation or applied the coercion or exercised the undue influence. Three cases must be examined. First, if the relevant act or statement was 'made' by the other party to the contract, or by a person acting on his behalf, it will suffice to make the contract voidable. For example, if I persuade my father to coerce you into contracting with me, or if I direct my employee to tell you lies in order for you to contract with me, it is as though the coercion were applied, or the fraud was committed, by me, because the one who uses an agent is treated as though he had done it himself. Second, and on the other hand, if a stranger tells you lies about something which I am proposing to sell, and he does not do so on my behalf, and I know nothing about it, you cannot rescind the contract which you conclude with me as a result of it, because I have done nothing to impair your consent.

The third case is more difficult. Suppose I know that another person has told you lies, or coerced you, to cause you to contract with me. If that person has acted without any encouragement from me, but I know (or, perhaps, ought to know) what he has done, is the contract voidable? Suppose I am selling a financial investment,

and that an independent agent, who is hoping for a payment or reward from me, tells you lies to encourage you to contract with me. He did not do so on my behalf but if I know that he has done so, or if I ought to know that he has done so, can I still enforce the contract against you? I may say that the wrongful causing of your consent is nothing to do with me but, equally, it would seem rather unsatisfactory for me to be able to take advantage of and enforce a contract which, as I know or should have known, you had been tricked or coerced into entering. Many common law systems would take the view that I cannot enforce a contract in such circumstances. There appears to be no decision of the Myanmar courts on the point, but one possible solution may be to ask whether, applying Section 13(3) of the Burma Laws Act 1898, it would be in accordance with 'justice, equity and good conscience' for me to enforce the contract in such circumstances.

(c) The burden of proving causation or absence of causation

Section 14 of the Act does not tell us which of the two contracting parties bears the burden of proof on the question of whether the consent was caused by the improper act of the other party, but this is a point of real importance. Because if the buyer says that she did not freely consent, because (for example) her consent was caused by misrepresentation, she may be telling the truth, or she may simply have changed her mind and is now arguing that there was a misrepresentation in order to try and get out of the contract. When we ask questions about causation, and we ask what would have happened *if* the statement made by the seller had not been made, we are asking, and trying to answer, a hypothetical question: a question about something which did not happen in the real world and to which there can be no certain, factual, answer. The immediate response to the question may be that we simply do not know, and that the most the court can do is to make an intelligent guess. The important question, therefore, is to decide who bears the burden of proof; who has the task of persuading the judge what would have happened if the pressure had not been applied, or if false statement had not been made.

The usual rule in civil litigation is that the person who alleges something bears the burden of proving it.¹⁰ However, in the case of disputes about the freedom of consent that may not be the right approach. Where fraud is proved by the buyer, most people will naturally think that it should be the fraudster who bears the burden of proving what the buyer would have done if there had been no fraud, and so on; and if that is true in the case of fraud, it may also be true for the other factors listed in Section 14. Of course, this can be difficult for a seller who had made a misrepresentation but who did not act wickedly: why should he have to prove that the buyer would still have made the contract, on the very same terms, even if the misrepresentation had not been made? Why should it not be the buyer who has to persuade the court about what she would or would not have done? The truth is that there is no easy answer to this issue. When the law requires us to decide what would have happened if something which did take place had not taken place, it asks us to answer a

¹⁰ Evidence Act, s 101, 102. See *Aung Tin Nyunt v Ma Khwe Ma* (1951) BLR 341 (HC).

hypothetical question. It may be that, as is the case in some other common law systems, a good solution for the court, applying Section 14, is to assume that the actual buyer would have behaved as a reasonable buyer would have behaved, so that the question is not so much: ‘what would this buyer have done?’ but ‘what would a reasonable buyer have done?’

4.4 ‘Coercion’ which makes contract voidable

If there is a sufficient case of coercion, it would not be right to hold the coerced party to the contract. Consent given under coercion is not free consent; and consent caused by coercion allows the coerced party, the victim, to rescind the contract.

We start with the meaning of coercion, which is given in Section 15:

15. ‘Coercion’ defined. ‘Coercion’ is the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

It is obvious that if any of the things mentioned in Section 15 is done, any consent which is caused by that thing is not a free consent, and the victim cannot be held to the contract against his will. If I tell you that I will kill your child unless you agree to sell me your land, or that I will keep your passport (which I have managed to get my hands on)¹¹ unless you agree to sell me your car, or that I will withhold your jewels unless you agree to make a payment of money,¹² or that although you owe me no money, your goods will be seized unless you make a payment, the consent is not free and the contract which this coercion causes you to enter into is one you should have an option to rescind.

It is important to note that an act, or threatened act, only counts as coercion if it is unlawful. All acts mentioned as crimes in the Penal Code are unlawful acts.¹³ Unlawful detention of property must refer to an act which is not one covered by the Penal Code (otherwise there would be no need to mention it), but which is unlawful for some other reason: that it is (or what is threatened is) a tort (whether a trespass to goods or conversion of goods).

What of the case in which I am entitled by law to detain your goods? This cannot amount to coercion. If you have left your goods with me for repair, but now find that you are unable to pay the cost of the repair, I am entitled to keep the goods as security for payment.¹⁴ If I say to you that I will release or return the goods if you agree to enter into a separate contract, and I do this knowing that you would not agree to the contract otherwise, this is not coercion because my detention of the goods is not unlawful. I may have taken advantage of my right to detain the goods until paid for

¹¹ *Ah Choon v TS Firm* AIR 1928 Ran 55, (1927) ILR 5 Ran 653 (threat of illegal seizure of goods to secure payment of debt owed by someone else).

¹² *Hla Maung v Ma Toke* AIR 1920 LB 38.

¹³ See *Ma Ain Yu v Netto* (1952) BLR 65 (SC) (fear of torture by Japanese caused deed to be executed).

¹⁴ Contract Act, s 170.

the repairs which I have undertaken, but the detention is not unlawful. However, it is otherwise where I believe that I have a claim to some property, but not necessarily to that which is detained: if I detain it, rather than making a demand and then filing a suit, I have taken the law into my own hands, and that may be taken as coercion.¹⁵

The definition of coercion in Section 15 is clear enough, but it may not be quite wide enough. Suppose a haulier makes a contract with a farmer to transport his crop of fruit, or with a fisherman to take his fish, to market in a refrigerated lorry. Suppose the haulier, realising that he is the only person for miles around who can offer this service, says to the farmer or the fisherman that, unless they agree to make a new contract for haulage at double the price, the haulier will stop performing his existing contract, with the probable consequence that the fruit or fish will be ruined. The farmer or fisherman may feel that he has no alternative but to submit to this threat to break the existing contract and to enter into a new one, but if this happens it appears that the conduct of the haulier does not count as coercion, because a threat to break a contract is not covered the Penal Code, and does not amount to the detention of goods. Whether it would amount to undue influence is a question we will consider under the next point.

The common law in other parts of the world used to define coercion in a similarly restrictive way, though it tended to call it duress, which means the same thing. But, in more recent years, an extended form of duress usually called 'economic duress' has been recognised as equivalent to the traditional forms. It is possible that the courts in Myanmar will face a similar issue in the future. One of the ways in which pressure can be applied to another person, for improper reasons, is by threatening to break a contract. We have just given one example of the haulier. Another example which serves to make the point is the case of the builder who undertakes to replace the roof of my house for a fixed price. Suppose that he has removed all the tiles from the roof, and that he then says to me that unless I agree to double the agreed price, he will simply stop work and leave the job undone, leaving me to sue him if I wish. I will probably agree to increase the price: what else can I really do if the rainy season is about to begin, or if a long public holiday is about to start? I may say that I was left with no real choice, and that my consent was not free consent. But the question asked by Section 15 is whether my consent was not free because it was caused by coercion. If the acts complained of do not amount to coercion, my consent cannot be said to be un-free.

If this answer does not feel right, one possible solution is to go back to Section 13(3) of the 1898 Act, and to argue that in a case in which one person threatens to break a contract - that is, to commit an unlawful act which has the same effect upon me as an act of the kind listed in Section 15 would have - it would be in accordance with 'justice, equity and good conscience' if the contract into which I have been pressured is treated as one which I may rescind. It is hard to see that this would be a

¹⁵ *Hla Maung v Ma Toke* AIR 1920 LB 38 (claim to fractional share of estate, but specific property seized: this was taking law into own hands, and so coercion); also *Ab Choon v TS Firm* AIR 1928 Ran 55, (1927) ILR 5 Ran 653 (threat to seize goods because of debt owed by a third party).

controversial step to take, especially as other parts of the common law world have come to the conclusion that this kind of unlawful act should be treated in the same way as the more traditional forms of duress or coercion. But it does not appear to have happened yet.¹⁶

A response to an act which is not unlawful is not done under coercion. Let us go back to the case of the haulier. Suppose I am the only haulier in the area who can provide the service which you are in need of, but I refuse to make a contract with you unless you agree to pay a much larger price than I charge to some of my other customers. If you agree to my extortionate terms, I do not commit coercion, for my actions are not unlawful: they may be harsh, but if I do not have a legal duty to make a contract with you, I commit no unlawful act if I refuse to make a contract with you. This cannot be coercion,¹⁷ even if you feel that you had no real choice. Likewise, a father who pays a sum of money to have his son released from lawful custody cannot claim to have done so as a result of coercion: a voluntary payment made as a response to a lawful act is not made under coercion, even though the choice to make it was not a happy one.¹⁸

4.5 'Undue influence' which makes a contract voidable

The second item in the list in Section 14 is undue influence, which is defined by Section 16:

- 16. 'Undue influence' defined.** (1) A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
- (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- (3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

The core of the law on undue influence is set out in sub-section (1): undue influence, as a factor which means that consent was not free, is present when one party is in a position to dominate the will of another and uses that position for unfair advantage. If the court is satisfied that these conditions are met, the contract is voidable. The requirements of the law are, therefore, three in number: that the parties are in a position

¹⁶ As to whether it might instead be seen as undue influence, see below.

¹⁷ Although 'lawful act' duress does exist in some common law systems, this would require a very extended interpretation of the meaning of coercion in the Contract Act and raises very difficult issues which are best avoided by not going down that route.

¹⁸ *Maung Chit Su v Maung San Gyaw* AIR 1928 Ran 173, (1928) ILR 6 Ran 238.

in which one is able to dominate the will of the other; that the party in the dominant position used that position; and that an unfair advantage was secured by its use.¹⁹

We can deal with the third of these components first, as it is the easiest of them. The question of undue influence will only arise as an issue if the court is satisfied that the contract was unfairly advantageous. It follows that, if I use my power to dominate the will of a weak-minded person and cause him to sell me his bicycle at a perfectly fair price, there is no undue influence in the sense in which Section 16 uses it. For the contract to be voidable on this ground, the transaction must be an unfair one.²⁰

Now let us consider the first requirement: that the position of the parties was that one was in a position to dominate the will of the other. This is not a question which requires us to find fault with the behaviour of one of the parties: it simply asks whether their relationship was one in which their relative positions gave one of them the opportunity to dominate the will of the other. Here, though, the Act makes life a little easier for us. Section 16(2) specifies some situations in which the relationship of dominance of another's will is deemed to be present, and in these cases there is no need to enquire into this issue any further. The relationships referred to in Section 16(2), are those in which one party is weak (whether by reason of young age²¹ or old age,²² or sickness or illness) where another is strong,²³ or in which one party is in a position of dependence (such as may be true of a client, patient, or novice) on another who has power over her (such as her lawyer,²⁴ her doctor, or the head of her religious institution). By contrast, in those cases which do not fall within Section 16(2), of which contracts between husband and wife would be the most obvious example, but ordinary contracts between parent and child,²⁵ or aunt and nephew,²⁶ would be another, it is still possible to show that one party was in a position to dominate the will of the other party, but in these cases it must be shown on the facts, as the law does not tell the court to assume it.

Whether the law confines undue influence to existing relationships, or accepts that it may take the form of a single, opportunistic, taking of advantage, is not clear. In one case in which an attempt was made to argue that there had been 'undue influence by giving alcoholic drinks', the court held that the defence was inadmissible as

¹⁹ See *Daw Maw Nwee v Abnin* (1962) BLR 232 (CC).

²⁰ *Mg Mya v Moosaji Ahmed & Co* AIR 1914 LB 22 (bargain fair and reasonable, so irrelevant that the will of the debtor may have been dominated).

²¹ See Illustration (a) to Section 16.

²² See Illustration (b) to Section 16.

²³ *Maung Aung Bwin v Maung Than Gyaung* AIR 1933 Ran 90. Also *Mariam Bibi v Cassim Ebrahim Malim* AIR 1939 Ran 278, (1940) RLR 35 (father presumed to dominate the will of his daughters, who had just reached age of majority, in relation to their inheritance rights). For further proceedings, see *Cassim Ebrahim Malim v Mariam Bibi* (1952) BLR 4 (SC).

²⁴ *Re Messrs L and T, a Firm of Advocates* (1956) BLR 40 (HC).

²⁵ *Maung Pu v Lucy Moss* AIR 1914 Ran 278 (no presumption of undue influence of adopted child over elderly parent, so no requirement that adopted child prove the absence of influence. It would have been different if the parent had been feeble by reason of age, but on the evidence she knew perfectly well what she wished to do, which was to favour one child over another); distinguished in *Maung Aung Bwin v Maung Than Gyaung* AIR 1933 Ran 90, where the niece and her husband appeared to have taken selfish and unconscionable advantage of the aged and feeble uncle.

²⁶ *Ko San U v Ma Thaug Me* AIR 1918 LB 67.

it was made too late; it did not indicate whether the defence would otherwise have been allowed.²⁷

Finally, the court must be satisfied that the dominant party used that position of dominance to secure the other's entry into the contract. As we discussed above, the question of how this is to be proved is a difficult one to answer, but here the Act comes to the aid of the party seeking to avoid the contract. Section 16(3) allows the misuse of the dominant position to be presumed if the contract appears on its face to be unconscionable;²⁸ if the contract is not apparently unconscionable, the misuse of a dominant position is not presumed but will need to be proved. But we need to be careful. If the court finds that the terms were not inherently unconscionable, but were the result of ordinary market forces operating between parties who were not otherwise linked to each other, and that the contract only appeared to be unconscionable in its effect because the debtor chose to accept stringent terms, this will not allow undue influence to be presumed.²⁹

All of this can appear to make a complex test. The individual parts of Section 16 all make sense: there needs to be a relationship in which one party can dominate the will of another; the relationship must be used (which means abused); and the result must be a contract which is unfairly advantageous, or unfairly disadvantageous, depending on how you look at it. What Section 16 does not say, but which is certainly part of the overall picture, is that in the various cases in which the presence of undue influence is presumed, whether from the relationship of presumed dominance, or the terms of the contract, the presumption can be rebutted by showing that the party had independent legal advice, or was advised, properly, to obtain such advice.³⁰

Yet what the cases also show is that the analysis made by the court is intensely fact-specific, with each case being examined on its own particular facts.³¹ There may be sharply conflicting evidence whether (for example) an elderly lady was still of firm opinions and independent judgment or was subject to domination by one of her younger relatives.³² There may be many reasons why an elderly and frail relation may appear to have favoured one child or relative to the exclusion of another: gratitude for care and kindness may be one reason, unhappiness with another who has been selfish or uncaring may be another,³³ and manipulation may be yet another. There

²⁷ *The Bank of Communication v Khin Company* (1966) BLR 811 (CC).

²⁸ *Mariam Bibi v Cassim Ebrahim Malim* AIR 1939 Ran 278, (1940) RLR 35. For further proceedings, see *Cassim Ebrahim Malim v Mariam Bibi* (1952) BLR 4 (SC). See also Illustration (c) to Section 16 (money-lending contract made on harsh terms by one who is already in debt to the lender).

²⁹ *Nabin Chandra Deb v Mi Robeya* AIR 1928 Ran 7 (though security given for debt of one-tenth the size, the debtor could easily have repaid the loan and saved the security; foolishness of debtor not an indication of undue influence). See also Illustration (d) to Section 16 (loan on harsh terms contracted in the ordinary course of business between lender and borrower who were not otherwise linked to each other not induced by undue influence).

³⁰ *Ko San U v Ma Thaung Me* AIR 1918 LB 67.

³¹ *Mariam Bibi v Cassim Ebrahim Malim* AIR 1939 Ran 278, (1940) RLR 35 (for further proceedings, see *Cassim Ebrahim Malim v Mariam Bibi* (1952) BLR 4 (SC)); *U Choung Po v U Aw* (1961) BLR 395 (HC).

³² *U Choung Po v U Aw* (1961) BLR 395 (HC).

³³ *Maung Pu v Lucy Moss* AIR 1914 LB 278.

may be many reasons why a parent enters into a security relationship for the apparent benefit of a child: a desire to help may be one, blind faith in the capacities of the child may be another, and belief that the lender can be outwitted may be yet another. Although the judges do refer to Section 16, they tend to proceed by looking closely at all the facts, and coming to a conclusion on whether the transaction was entered into freely.³⁴

If we go back to the case of the builder who threatens to abandon work on the roof of my house unless I agree to make a more expensive contract with him, it may be possible that this case falls within Section 16, and that there is therefore no need to try and fit it within Section 15. The advantage which the builder obtains may be seen as unfair; and he certainly used his bargaining advantage to force me to agree to his terms. Can it be said that the relations between us were such that he was in a position to dominate my will? It is hard to be sure. On the one hand, the relationship between builder and client is not generally one of those in which the builder holds authority over the other, or in which the mental capacity of the client is impaired. On the other hand, as a matter of fact the builder was in a position to dominate my will, and he used that position to obtain an advantage which certainly looks unfair. The commercial relationship between a builder and a customer is not what one traditionally thinks of when one is looking for an example of a relationship which is liable to give rise to undue influence. But perhaps it does.

Finally, it is noteworthy that the Contract Act makes no reference to a separate broader principle of 'unconscionable dealing' which does exist in many common law jurisdictions. It may be, therefore, that the Myanmar courts will feel able to give 'undue influence' a wide meaning. And certainly Section 16(2) makes clear that the general principle is set out in Section 16(1) so that the reference to particular relationships where one party is deemed to be in a position to dominate the will of another is expressed to be 'without prejudice to the generality of the foregoing principle'.

4.6 'Fraud' which makes a contract voidable

It is obvious that fraud makes a contract voidable: every civilised system of law would agree that if your consent to a contract is caused or obtained by the fraud of the other party to the contract, the contract is one which you should be able to rescind. It will be necessary to establish, in accordance with Section 14, that the fraud of the other party³⁵ caused consent to be given, in the sense that if there had not been fraud it would not have been given, but we have dealt with that already. At this point our enquiry is as to the meaning of fraud, and the definition is given in Section 17:

³⁴ *Daw Mya May v Daw Hla Yin* (1965) BLR 237 (CC).

³⁵ Though for the argument that the result is the same if the fraud is committed or practised by another person on behalf of the contracting party, and may be the same if it is committed or practised by a third party but known about by the contracting party, see above, Chapter 4.3(b).

17. 'Fraud' defined. 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specifically declares to be fraudulent.

Explanation: Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

(a) Relationship to misrepresentation

There may appear to be an overlap between fraud and misrepresentation, but the difference between Sections 17 and 18 is that Section 17 covers cases in which the victim is tricked into giving consent by the other party who knows that it is giving a false impression of the facts; but Section 18 applies to cases in which the victim's consent is given to the other party in circumstances in which the other party does not realise that it is conveying a false impression. Section 17 therefore covers cases of deliberate or conscious misleading of the other party; Section 18 may apply in the case of unwitting or unintended misleading of the other party. Where conduct falls within Section 17 it is natural to speak of deceiving the contracting party; where it falls within Section 18, no element of deception or trickery is required: innocent misleading is all that needs to be shown.

(b) Definition of fraud

The definition of fraud in Section 17 is not entirely straightforward. The structure of Section 17 is that various examples of 'acts' are defined as fraud provided they are committed with either the intent to deceive the other party or the intent to induce the other party to enter into the contract. So if there is an intent to deceive, there is no need to prove an intent to induce the other to enter into the contract; and vice versa.

But the 'acts' are also defined in subsections (1)–(5) to include mental states; and it is not entirely clear what some of those definitions are meant to cover.

However, we can start with the easy case: telling lies is fraud. If I tell you that the horse which I am offering to sell to you is sound when I know that it is not, that is fraud; telling you that the car was manufactured in Japan when I know it was not is fraud.

It is the same when I am aware that what I am telling you may not be true but I conceal the doubt. Suppose a horse is ill. If I tell you that the horse is sound when I suspect that it may have picked up an illness but which has not shown up yet, the

statement is fraud. Suppose a car was manufactured in Malaysia. If I tell you that the car was manufactured in Japan when I suspect that it was not but cannot actually be sure, the statement is fraud. These are cases of fraud because I do not believe the truth of what I tell you: I am aware that it may not be true, but keep my doubt hidden from you. This is fraud because I do not believe the statement to be true: to believe (or hope) that something may be true is not the same as believing that it is actually true.

Making statements which are technically accurate but which will be taken to the reasonable listener to suggest the opposite are liable to be seen as fraud. Suppose I offer my bicycle for sale to you and tell you that it was purchased new only a month ago. This may be correct, but you will interpret it to mean that it is still in almost perfect condition. Suppose that what I do not mention is that the bicycle had been in an accident the day after I bought it, and that it has had to be repaired. Such a case may fall within Section 17(1) if it is said that I have *suggested* that the bicycle is in perfect condition; it may fall within Section 17(2) if the words I use are taken to conceal the truth. And, as we shall see below, the Explanation confirms that my failure to mention the accident may be taken as fraud, because my silence about the accident is, in all the circumstances, the same as making a false suggestion about it.

Making a promise which I do not intend to perform is fraud. Suppose I sell you my bicycle, and in order to encourage you to buy it I promise that if you buy it I will repair it, if ever it needs repair. If when I make that promise my intention is not to do what I had promised to do, then that is liable to be seen as fraud falling within Section 17(3). It would not fall within Section 17(1), because it is not a suggestion about facts, rather it is a statement about intentions. But if it is a promise which I intend to ignore if ever I am called upon to perform it, it will be an example of fraud.³⁶

It is not entirely clear what is covered by Section 17(4) of the Act. But it is a 'sweeping up' provision. There are many ways to trick a person, and if there has been a deliberate or conscious misleading of the other party, it would be unsatisfactory if the party said to have misled the other were able to argue that it did not quite fit within Sections 17(1)-(3). A provision which says, in effect, that 'any other form of conscious misleading' will fall within Section 17 caters for those occasional cases. For example, if I tell you that the business which I propose to sell to you has good prospects for future growth, it may be said that this is not a statement or suggestion of a fact, because it is really an opinion rather than a fact. But this opinion may encourage you to believe that the underlying facts justify me in having this opinion, and if I am aware that this opinion is not necessarily accurate, my expression of opinion is fitted to deceive you, and will fall within Section 17(4). It may also fall within Section 17(1), if it 'suggests' a fact which is not true, but Section 17(4) means that it is covered by at least one of these.

Section 17(5) refers to 'any such act or omission as the law specially declares to be fraudulent'. Perhaps what is meant by this obscure subsection is that there may be

³⁶ And in this case it may also attract criminal liability under the Penal Code: see below.

provisions in other statutes that declare that particular forms of conduct are fraudulent.

(c) Fraud by silence

Making statements which were true when they were made, but which become false when circumstances change before the contract is made, is liable to be seen as fraud. If I tell you that the horse I am offering for sale is in perfect condition, but by the date on which we actually come to make the contract it has sustained a serious injury, and I know about this, my silence (which really means my failure to correct the impression which I gave you, but which is now false) is liable to be seen as fraud.

There are other cases in which I may realise that you are holding a false impression about something which is important, and in which my silence does not constitute fraud; and this is a point covered by the Explanation to Section 17. Suppose I offer a Toyota car for sale. Although the car is a Japanese make of car, some Toyota cars are assembled in India, not Japan; and the ones assembled in India are, let us assume, not as desirable as those made in Japan. If you inspect the car and say things which show that you are under the impression that it was made in Japan, but I say nothing at all, this will not be fraud on my part. That, at least, seems to follow from the first of the Illustrations given in Section 17.³⁷ I have no duty to speak if I have not led you to hold the wrong impression which it appears that you do have; it is not my job to correct every mistake which I can see that you are making. The general rule of the common law, after all, is *caveat emptor*: let the buyer beware. If I created the false impression which you hold, my silence in response to it may be considered as the equivalent of speech; if I do not create it, but simply observe that you have assumed or adopted it, then my silence is not the equivalent of speech, and my silence will not be counted as fraud, no matter how much I may seek to gain by keeping quiet. However, if you tell me that you will make an assumption about a material fact unless I deny it, then in those circumstances the Act considers my silence to be the equivalent of speech.³⁸

It is hard to deny that there may be a very fine line between cases in which my silence may be seen as equivalent to speech, with the result that I may have a duty to speak to correct a false impression held by the other party, and those cases in which my silence is not equivalent to speech and I have no such duty. It cannot be claimed that Section 17 will always be easy to apply. Consider the case in which you adopt a false opinion, and I then say something to agree with you. There are then two factors which contribute to the opinion which you hold. In principle, this should be enough to constitute fraud on my part; but here, in particular, it can be much more difficult in practice to apply Section 17 than it is to describe its general effect.

³⁷ According to Illustration (a), there is no duty on seller to disclose that a horse to be sold at auction is unsound: the seller may keep silent and will not commit fraud by doing so.

³⁸ Illustration (c) to Section 17.

(d) Liability under the Penal Code

A person who commits fraud within the scope of Section 17 may also commit cheating under the Penal Code. As was explained in Chapter 1,³⁹ this book does not explore the extent which parties who make contracts may also incur liability under the Penal Code, and for this reason no more will be said about this possible liability. But Sections 415 to 420 of the Penal Code⁴⁰ may be applicable in cases in which the contract which has been made is voidable for fraud.

4.7 'Misrepresentation' which makes a contract voidable

In general terms, fraud is a kind of misrepresentation. When I tell lies about the thing I am trying to sell to you, I make a false statement of fact, and that is obviously a misrepresentation. But Section 18 of the Act defines misrepresentation in such a way that it applies to misrepresentation (whether by words or otherwise) which is not fraudulent, that is to say, misrepresentation in which the party making it does not realise that the statement is false, or in which the party making the statement does not intend to deceive, or in which the party making the statement does not realise that it has caused the other party to make a mistake about the subject of the agreement. It would have been helpful if the Act had called it 'non-fraudulent misrepresentation', or even 'innocent misrepresentation', but there it is: Section 18 simply calls this misrepresentation, and it reads as follows:

18. 'Misrepresentation' defined. 'Misrepresentation' means and includes:-

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

In other words, if any of these three factors leads (or, rather, misleads) a person to consent to an agreement, the contract so formed is voidable at the option of the party so misled. If therefore I offer to sell you a mobile telephone which appears to have been made by a major manufacturer in Japan, which is certainly what I believe and tell you, but it is in fact a Chinese-made copy, then even though my misrepresentation may be innocent, in the sense that I did not realise that it was conveying a false impression and is therefore not fraud, you can, in principle at least, rescind the contract when the truth comes to light. This is because I made a positive assertion of something not true in circumstances in which this was not justified by my information (the expression 'warranted by' means 'justified by', rather than 'promised by').

³⁹ Chapter 1.2(iv).

⁴⁰ On which, see Chapter 1.2(iv), above.

It is also a case of misrepresentation where I cause you to make a mistake about the thing which forms the substance of the agreement. If I offer to sell you a quantity of corn which is fit for feeding to animals, but because of something which I say about it you assume that the corn is fit for human consumption, and you buy it on the basis of that false belief, you are, in principle, entitled to rescind the contract. Whether the mistake caused is one as to the substance of the agreement will sometimes be hard to say; but it seems unlikely that a mistake, innocently caused, which is solely as to the value of a thing is a mistake as to the substance of the agreement within the meaning of Section 18(3).

4.8 Self-Induced mistakes do not make a contract voidable

It will have been seen that there are many circumstances in which a person may say that he made an agreement, and gave his consent, on the basis of a mistake, and that if he had known the truth he would have behaved rather differently. For example (1) we both believe that the horse which I offer to sell and which you agree to buy is alive when in truth it had died an hour before the agreement was made;⁴¹ (2) we both believe that the market price for rice is X kyats per kilogramme when it is in fact Y kyats per kilogramme;⁴² (3) I offer to sell you a quantity of grain which I know is not fit for human consumption, but although you believe that it is fit for human consumption, I do not realise that you hold this mistaken belief;⁴³ (4) I offer to sell you a quantity of grain which I know is not fit for human consumption, but you believe that it is fit for human consumption and I realise that you hold this mistaken belief;⁴⁴ (5) I write to you to offer goods for sale at 6000 kyats each when I had meant to write 60,000 kyats each; you, suspecting that I had made a mistake, accept this proposal, knowing or suspecting that I had made a mistake about the price;⁴⁵ (6) I come into your shop and tell you that I am a Member of Parliament (though this is not correct), and you, believing me, allow me to buy an article from you at a much lower price than you would normally charge; (7) I come into your shop to buy an article; I have a very strong resemblance to a well-known film actor, and although I say nothing, I know that you mistake me for that person when you allow me to buy an article at a very low price;⁴⁶ (8) I tell you that the land next door to mine is owned by a man who

⁴¹ This mistake of both parties as to an essential matter of fact will make the agreement void: Contract Act, s 20; see above, Chapter 3.3.

⁴² This mistake of both parties is not one as to a matter of fact, and will not make the agreement void: Contract Act, s 20, Explanation; see above, Chapter 3.3.

⁴³ This mistake of fact by one of the parties does not make the contract voidable: Contract Act, s 22.

⁴⁴ If I made no representation, and therefore did not cause you to make the mistake of fact which you make, the contract is not voidable: Contract Act, ss 18(3), 22. Neither is it fraud: Contract Act, s 17, Illustration (a).

⁴⁵ It does not appear that my mistake gives me the option to avoid the contract. It was not caused by the other party, and to know or suspect that the other party has made a mistake is not to cause him to make the mistake.

⁴⁶ The mistake made by the shopkeeper is caused by fraud, and the contract will be voidable at his option. But if it can be said that the shopkeeper's proposal was not addressed to the rogue (who purported to accept it) but to the famous person who was not there (and who played no part in the story),

will never allow it to be sold for development, as a result of which you pay a good price for my land; I did not know that the neighbour had recently died and that his children were intending to sell the land for industrial use;⁴⁷ (9) I offer to sell you a car, and I tell you that because it was imported into the country before a certain date, it does not require a permit to be driven on the roads of Yangon. But this is not correct: even cars imported many years ago are required by law to have a permit for use in Yangon.⁴⁸

In all these cases it is probably correct to say that you make the agreement with me under some form of mistake, and probably correct to say that in every case if you had not made this mistake you would not have agreed to contract with me on the terms on which you did contract. That may mean that you have made the contract under a mistake. But the question we now need to address is when it is that mistakes render a contract void or voidable. And in dealing with this we need to deal separately with mistakes concerning a matter of fact, and mistakes on a point of Myanmar law.

(a) Contract caused by a mistake of fact

Even if a party made a mistake on a matter of fact, and would not have given his consent if he had not made that mistake of fact, it does not follow that the contract is voidable by him, and there are at least two reasons for this. One is that the circumstances of the particular mistake may actually mean that the agreement is void because both parties made a mistake as to a matter of fact essential to the agreement: this possibility is provided for by Section 20, which we examined in Chapter 3. Another, and what we are here concerned with, is that the mistake of fact does not make the contract voidable because it was entirely your own mistake, a self-induced mistake, and was not a mistake which I caused or for which I was responsible. This is explained by Section 22, which provides as follows:

22. Contract caused by mistake of one party as to a matter of fact. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

It is one thing to allow you to rescind a contract which you entered into under a mistake when I am responsible for that mistake (whether by fraud or by misrepresentation). But it is quite another to allow you to rescind a contract, on the basis that you entered it under a mistake of fact when I did not cause or contribute to the mistake, or when I did not realise the mistake you were making.

The Contract Act therefore makes a number of points concerning mistakes which might be relied on as the basis to rescind a contract. If your mistake of fact results from my fraud, in the sense of Section 17 of the Act, you may rescind the contract. If your mistake results from my (innocent) misrepresentation in the sense of Section

there will be no contract because there will have been no acceptance of a proposal; see above, Chapter 3.4(e).

⁴⁷ The contract of sale is voidable unless it is said that the only mistake which you make about the land of mine which you buy is as to its value rather than its substance or nature: Contract Act, s 18(3).

⁴⁸ This is a mistake of law, and the contract is accordingly not voidable: Contract Act, s 21.

18, you may rescind the contract. But if it does not result from either of these, the Act places the risk upon you alone, and does not give you the option of rescinding the contract. Though there will be cases at the edge - there are always cases at the edge - which seem difficult, the general approach of the Act seems highly sensible. In effect it works on the basis that if I caused your mistake you may rescind the contract, but if your mistake was not one which I caused, the contract cannot be rescinded by you. That appears to be a sensible division of responsibility for mistakes made concerning matters of fact.

(b) Contract caused by a mistake of law

However, a party who gives his consent to an agreement and makes a contract because of a mistake of Myanmar law does not have the option of avoiding the contract. Section 21 is quite clear about that:

21. Effect of mistakes as to law. A contract is not voidable because it was caused by a mistake as to any law in force in the Union of Myanmar; but a mistake as to a law not in force in the Union of Myanmar has the same effect as a mistake of fact.

If we enter into a contract on the basis of a belief, held by us both, that a particular debt is now barred by limitation, so that legal proceedings may not be brought to recover it, but we are wrong about that, we make a mistake of law, and the contract is not voidable (neither is it void). This is shown by the Illustration to Section 21, which appears to lay down a rule to which there is no exception.

Section 21 has been said to reflect the principle that ignorance of the law is no excuse.⁴⁹ It may be more helpful, however, to say that Section 21 states a rule of legal policy, and to leave it at that. Let us take another example. Suppose that I enter into a contract with an architect for him to produce plans for the tearing down of my house and the redevelopment of my land. Suppose I do this because I believe that the law allows me to do this work, but I am wrong about this because the law had recently changed and such development or redevelopment is not now permitted. Say we both made the same mistake. I will be bound to pay the architect the fee for his work, even though I would not have given my consent if I had not misunderstood the law. In some systems of the common law, a party who makes a mistake as to law may now be permitted to rely on this to escape from contractual liability provided the mistake would have allowed this had it been a mistake of fact. But the Contract Act does not allow this except where the mistake is as to a rule of foreign law.

Even though Section 21 appears to state a rule without exceptions (other than for foreign law), we may still ask whether the position is the same or different if the reason for my making a mistake as to the law is because the other party to the contract gives me false information about the law. This may be regarded as properly going to the definition of fraud or misrepresentation but is helpfully considered here. Suppose in the example just mentioned it is the architect who tells me - a simple man who knows nothing about the law - that the law allows me to redevelop

⁴⁹ *Daw Saw Hla v Maung Sein* (1963) BLR 773 (CC).

my land, and so forth. Does the fact that my mistake of law was caused, and may be caused in a deliberate way (which would be regarded as fraudulent if it had been a mistake of fact) make any difference? Or does Section 21 still mean that my mistake of law has no effect on the validity of the contract, no matter who caused me to make that mistake? Or suppose I go into a shop in Yangon which sells antiques which are more than 100 years old. Before buying the antique item I ask the shopkeeper whether I am permitted to export the item from Myanmar, and she assures me that I am allowed to do this. But before I leave the country I learn that it is not permitted to export such items from Myanmar; and when I try to rescind the contract with the seller, she says that I cannot do so because my mistake was a mistake of law.

Although Section 21 would appear to mean that the contract cannot be rescinded, it is not clear that this answer is satisfactory. A better answer would be that, if one party chooses to give legal advice to another, and if that legal advice is inaccurate and causes consent to be given when it would not have been given if the law had been fully understood or accurately stated, the person who gave the false legal advice should be prevented from enforcing the contract, and the other party should be permitted to rescind it.⁵⁰ In other words, fraud or misrepresentation should extend to induced mistakes of law as well as fact. Although this is not the answer which the Contract Act appears to give, it would be right in principle. After all, 'justice, equity and good conscience' should prevent a person who has misled another to enter into a contract from enforcing that contract, even where - or, perhaps, especially where - the misleading concerned the law. Perhaps Section 13(3) of the Burma Laws Act 1898 provides the best solution to a problem like this.

4.9 The consequences of a contract being voidable because consent was not free

We have been speaking in general terms of an agreement giving rise to a voidable contract, but it is now time to consider in more detail the consequences, in terms of remedy, of a party's consent not being a free consent. The law is stated in Section 19 in the following terms (we will deal separately with Section 19A):

19. Voidability of agreements without free consent. Where consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations had been true.

Exception.- If such consent was misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

⁵⁰ There is an analogy of some sort to be drawn with the rule in the third paragraph of Section 56, which was examined above, Chapter 3.4.

Explanation.- A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

There is a lot to examine if we are to understand Sections 19 and 19A; and we will need to take a number of points separately.

(a) The option to rescind the voidable contract

The primary remedy available to the party who discovers that the contract is voidable is the rescission of the contract. Section 19 explains that the party whose consent was not free consent has the option to rescind the contract, which therefore means that the contract remains valid and binding on both parties unless and until the party who has the option rescinds it. Section 19 does not use the term ‘rescission’, but Section 64 does do.⁵¹

(b) The effect of rescission on benefits conferred

The effect of rescission of the contract is that the contract ceases to be a source of legal obligations: not just in the sense that it comes to an end for the future, but in the more fundamental sense that the law seeks to undo or unpick what the contract had done, and to reverse what the parties to the contract had done by way of performing it. The remedy of rescission in such circumstances⁵² looks backwards, rather than forwards; and it is partly explained by Section 64:

64. Consequences of rescission of voidable contract. Where a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if had received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Section 64 clearly deals with the consequences for the other party of the innocent party rescinding a voidable contract. It explains that, once rescission has taken place, the promise of the other party to the contract is no longer enforceable. And in line with the idea that the parties to the now-rescinded contract should be put in the position which they were in before the voidable contract was made, the party who rescinds the contract (the ‘innocent party’) is required to give back any benefit which it obtained under the contract. No doubt this means that property must be handed back, if it is still possible for the rescinding party to do it, and money must be repaid. All this is as one would expect.

Rather less expected, perhaps, is the absence from Section 64 of any statement about the effect of rescission on the promise of the innocent party, or on the benefits that the innocent party has conferred on the other party. Although one would expect that other party to be equally bound to restore benefits which he or she received

⁵¹ See below.

⁵² That is to say, rescission of a voidable contract on the ground that consent was not free consent.

under the voidable contract, Section 64 does not say so; and as no Illustrations are given in connection with Section 64, this is something of a puzzle. Plainly the law cannot require the 'innocent party' to restore benefits received while leaving the other party to keep whatever was received, so a solution must be found outside Section 64.

Section 65 may be the solution. It provides as follows:

65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

At first sight, this Section does not apply to voidable contracts because it is expressed as applying only to void agreements and to contracts that become void. And we have seen that the Contract Act divides between void agreements, contracts that become void (because of subsequent impossibility or illegality), and contracts that are voidable. To apply Section 65 to a voidable contract would cut across that division and would mean that every voidable contract would become a void contract once rescinded. Moreover, if Section 65 were to apply to a voidable contract that has been rescinded, it would render the second sentence of Section 64 redundant.

Nevertheless, as a matter of language, one might say that once a voidable contract has been rescinded, it has become void. And there are judicial statements in Myanmar and elsewhere that support the view that, once rescinded, a voidable contract is to be seen as void.⁵³ Certainly it would be unsatisfactory if the (innocent) party rescinding the contract were under an obligation to restore benefits while the other (guilty) party was not. And in any event, although the outcome may seem obvious, one surely needs an explanation for why the innocent party who has rescinded the contract is not bound to perform. The proposition that the contract becomes void on rescission would provide that explanation.

The best practical solution, therefore, is to accept that a voidable contract, once rescinded, becomes void. That means that, applying Section 65, the innocent party (as well as the other party) is entitled to the restitution of benefits it has conferred on the other party. We shall defer further discussion of the restitution of benefits under Section 65 and generally until Chapter 10.

A word should be said about the passing of title to goods (or land) under a voidable contract. Goods transferred pursuant to a voidable contract will have become the property of the transferee: this is because they were transferred pursuant to a contract which was at the point of delivery or transfer a valid contract. However, the title to the goods was voidable only. Hence the effect of rescission is that the title in the goods, assuming they still exist, reverts to the owner unless the goods have been acquired by a bona fide purchaser for value without notice of the seller's defect of title.⁵⁴

⁵³ See especially *Satgur Parsad v Har Navain Das* AIR 1932 PC 89, (1932) 59 Ind App 147 (rescission of contract for undue influence and fraud: decision of the Privy Council on appeal from the Chief Court of Oudh); *Muralidhar Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35 (rescission of contract for breach: decision of the Privy Council on appeal from the High Court of Calcutta).

⁵⁴ See the discussion of s 29 of the Sale of Goods Act 1930 at Chapter 4.1, above.

(c) The effect of rescission on the possibility of claiming damages for breach

The first sentence of Section 64 provides that the consequence of rescission of the voidable contract is that the other party has no obligation to perform any of its promises contained in the contract. It follows that it would be inconsistent, and impossible in law, for the innocent party to rescind the contract in this way and at the same time claim damages for its breach.

The corollary of this rule is that a party who elects not to exercise the option to rescind the contract does not prevent himself from suing the other party for damages for breach of contract. We return to this possibility below, after we have concluded our explanation of rescission.

(d) The method of rescission

The question of how the option is exercised, how rescission of a voidable contract is done, is primarily an issue of communication of the exercise of the option, and is answered by Section 66, which provides that:

66. Mode of communicating or revoking rescission of voidable contract. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as to apply to the communication or revocation of a proposal.

In other words, if the party who has the option decides to rescind the contract, Section 66 tells him how to communicate this decision. Rescission of a voidable contract is a unilateral act, for the law gives the option to rescind the contract to one of the parties, and the exercise of an option is a matter on which that party alone has the right to decide. It needs to be communicated,⁵⁵ however: it would be most unsatisfactory for a party to be able to rescind a contract secretly. The manner of communication, which is generally provided for by Section 3 of the Act, was discussed in another chapter. Where the other party is not to be found - if, for example, he has practised his fraud and has vanished - it seems that communication of the rescission should be performed by doing the best that can reasonably be done, say by contacting the police.

Section 66 also deals with revocation of a rescission if it has not yet become effective by being communicated. It is obvious, however, that once a rescission has been communicated, the option has been exercised, and it is too late for the party who exercised the option to change her mind about what she has done.

(e) No rescission where the coercion, fraud or misrepresentation was not the cause of consent being given

Of course, if the contract is to be rescinded, the first point is that the coercion, fraud or misrepresentation must cause the other party to give his consent. The point was

⁵⁵ Unless the contract itself provides that such notice need not be given: *Pannalal Rangalal v Tin Tin U* (1954) BLR 19 (SC).

made and explained at an earlier point in this chapter, but it is made again, as regards fraud and misrepresentation, in the Explanation to Section 19, and it is so important that it should be repeated here. For a party to have the option to rescind the contract, it is not enough that the other party told a lie or concealed a truth, or threatened to commit an unlawful act, for example, unless this actually had a material impact on the other party. If, therefore, the court concludes that other party would have made the very same contract in any event, even if this behaviour had not been committed, the behaviour did not cause the other party to give his consent. Such ineffective behaviour may be blameworthy, but it does not lead to the contract being voidable.

(f) Restricted power to rescind if the innocent party could have discovered the truth for himself

A different objection to one party having the option to rescind the contract arises from the Exception stated in relation to Section 19. If the consent was caused by misrepresentation within Section 18, or by silence of the kind which Section 17 treats as fraudulent, the contract will not be voidable if the party whose consent was so caused could and should have discovered the real truth for himself.

The reason behind this provision is that if the conduct of one party is sufficiently bad, such as is the case with fraud, it will not matter that the innocent party failed to act in a particular way; but where the conduct of the party who had caused the other to consent is of a lower degree of culpability, the law is entitled to expect the other party to take reasonable care of his own interests. To put the same point another way, commercial relations would be very awkward to manage, and commercial negotiations would be very difficult to enter into, if the risk of misleading the other party, which may have disastrous consequences for the validity of the contract, lay all on the one side. Instead, the law says that those who remain silent when the Act does not require them to do otherwise, or those whose misrepresentation was made without any intent to deceive, are entitled to say to the other party, who is seeking to rescind the contract: 'if you could have discovered what the truth was, and this would have required no more than reasonable effort on your part, then it is really as much your fault as mine, and you may not avoid the contract after all'.

For example, if I offer a business for sale, and make available the account books and financial records (which would show, and would not conceal, that all is not well with the business), but the buyer says: 'I can see that the business is in great shape; I don't need to look at the books', and the seller then says nothing at all, then even if this is seen as a case of fraud by silence, it would have been possible for the buyer, using no more than ordinary diligence or care, to examine the documents and discover the truth. For this reason the contract will not be voidable. By contrast, if the seller had said 'this is a very profitable business' when he knows that this is not true, he commits fraud; it is the same if the buyer says 'unless you tell me that I am wrong I shall assume that the business is profitable' and the seller says nothing.⁵⁶ When the

⁵⁶ See Illustration (c) to Section 17.

buyer discovers that he has been lied to, he is entitled to rescind the contract even if it would not have been difficult for the buyer to have discovered the truth.⁵⁷

To put the matter at its simplest, if the ground on which the party seeks to rescind the contract is listed in Section 15, or in Section 17 points (1)-(5), it does not matter if the truth could have been discovered with ordinary diligence; but if the ground on which the party seeks to rescind the contract is found in the Explanation to Section 17 or in Section 18, she will be prevented from doing so if she could have discovered the truth with reasonable diligence.

(g) Other reasons why rescission may not be permitted

There may be other reasons why the option to rescind the contract is not available to the party who wishes to exercise it at the time he attempts to do it. After all, it cannot be the law that he holds the fate of the contract in his hands for ever. Ordinary commercial principle, as well as the law, requires that options be exercised clearly and diligently.

Suppose for example that, shortly after I complete the purchase of a car, I discover that the seller had committed misrepresentation within the scope of Section 18. However, although I would not have made the contract to purchase the car at the price I paid for it if I had known of the truth, the misrepresentation was of a rather small matter, and I am now too busy to spend time in rescinding the contract and dealing with the arguments which this sometimes gives rise to. So I decide not to rescind the contract, and I tell the seller of my decision. Then suppose that six months later I change my mind, and the question arises whether I still have the option to rescind the contract. The Act does not give any clue as to the answer, but the general approach of common law systems would be that, if I have given the clear message that I am not going to exercise an option, the option is then expired or dead. I cannot then change my mind and bring it back to life.

Suppose that the facts are the same, but that rather than telling the seller that I am not going to exercise my option, I allow many months to go by, and that as a result a reasonable person would conclude that I had taken a decision not to exercise the option to rescind the contract. Here also the Act gives no guidance, but the general approach of common law systems would say that unreasonable delay operates as a bar to rescission. One may say that, if a reasonable person would conclude from my behaviour that I had clearly decided not to rescind the contract, the option is no longer exercisable by me.

A linked explanation for why the option to rescind the contract may be lost in these cases is that the party with the option gives a clear, or as-good-as-clear, message that he is not going to treat the contract as voidable after all. For if he has an option to rescind the contract, he also has an option not to rescind the contract, and if that is what he decides to do, or appears to have decided to do, that concludes the debate about rescinding the contract.

⁵⁷ See Illustration (a) to Section 19.

Now suppose that instead of rescinding the contract, I tell the seller that I require the contract to be performed, as the second paragraph of Section 19 allows me to do. When I do this, I confirm that I acknowledge⁵⁸ that the contract is voidable, but exercise instead the alternative option which Section 19 gives me, and which we will examine in detail below. If I do this, but fail to obtain the relief which this provision says I am entitled to demand, the question may arise whether I can in those circumstances go back and claim to rescind the contract after all.

The correct answer is that I can. When I took advantage of the right to insist that the contract be performed, I was not saying, by word or by deed, that I was treating the contract as though there were no flaw in it. I was instead saying that the flaw gave me the right to insist on performance of the representations; but if that does not work - perhaps the other party is simply not able to do what is required by the second paragraph of Section 19 - I do not say anything inconsistent when I then decide to rescind the contract after all. The analysis might have been different if the effect of seeking relief under the second paragraph of Section 19 had been to say that I am regarding the contract as valid and binding; but the manner in which Section 19 is framed makes it clear that in seeking this relief I am continuing to draw attention to, and rely on, the fact that the contract is a voidable one. I am not treating it at any point as though it were not voidable.

There may be another reason why the contract cannot be rescinded, even though my consent was caused by fraud. Suppose a person induces a shopkeeper to hand over a watch which is offered for sale by impersonating someone famous, and that because of this fraud, the shopkeeper allows the watch to be taken away before payment is made, perhaps because the person says she needs her husband to approve the purchase. But the person is a rogue, and as soon as she leaves my shop she sells the watch to a third person who buys it in good faith and who obtains⁵⁹ a perfect title as a result. When the truth is discovered, can the shopkeeper rescind the contract? The answer to the question is probably not and certainly the effect of the Sale of Goods Act is that one cannot disturb the title of the third party purchaser. The alternative remedy against the rogue would be for compensation (under the second paragraph of Section 19 which we discuss below), but the likelihood is that she will have no funds and will not be worth suing. The fact that the contract is voidable, in such circumstances, will therefore bring little joy to the innocent party. It is for this reason, as we said above,⁶⁰ that the shopkeeper may be tempted to seek to argue that the agreement was void on the ground that there was no proposal made to a person who was invited to accept it.⁶¹

(h) Alternative to rescission: insisting that the contract be performed

It is now time to return to Section 19, and the alternative rule in its second paragraph which explains that the party whose consent was caused by fraud or misrepresenta-

⁵⁸ I 'admit and aver' that the contract is voidable, as pleaders tend to say.

⁵⁹ Sale of Goods Act, s 29; see above, Chapter 4.1, above. ⁶⁰ Chapter 2.3(b), above.

⁶¹ The agreement cannot be said to be void on the basis of Section 20 (discussed above, Chapter 3.3), as there was nothing common about the mistake.

tion (this alternative rule does not apply to cases of coercion) may instead insist that the contract shall be performed and that he shall be put in the position he would have been in if the representation, which would have allowed him to rescind the contract, had been true. After all, he has an option to rescind the contract, and that necessarily means he also has the option not to rescind the contract.

This provision has the effect of treating the representations which were made and which fell within Sections 17 and 18 as though they were not just representations, but promises. In many other common law systems, a court would need to ask whether a statement which had been made was just that or was in fact a promise, a guarantee. But in Myanmar it is different: all representations falling within Sections 17 and 18, which would have given the party the option to rescind the contract, may be treated by him as promises. He has, in law, two options.

Of course, it is one thing to insist on being put in the position as if the contract had been performed; it is quite another to be in that position. What the second paragraph of Section 19 really means is that, provided he is not rescinding the contract for the fraud or misrepresentation, an order may be made requiring the contract to be performed as though the false statement were a term of the contract. The point is explained by Illustration (c) to Section 19: if the seller of an estate tells the buyer that it is free of mortgage, but this is not true, the buyer may, instead of rescinding the contract, require the seller to redeem the mortgage and convey the estate free of the mortgage.

In other cases, if the plaintiff exercises this right, but the defendant is not able to perform the contract according to its terms, it seems that the plaintiff may obtain compensation in place of the performance of the contract. For example, suppose you sell me a car. You tell me that it has been imported directly from Japan, but it was actually manufactured in Thailand, which makes it less valuable and less desirable. You offer it for sale for \$15,000, which I think is a very attractive price, because such a car, directly imported from Japan, would really be worth \$20,000. But in fact, as it was made in Thailand it is worth only \$12,000. When I pay \$15,000, I receive a car which is actually worth \$12,000. If I treat the contract as voidable, and avoid it, I return the car and receive back my \$15,000, which puts me back where I was before the contract was made. However, if I invoke the second paragraph of Section 19, I am entitled, instead of rescinding the contract, to keep the contract alive and insist that the contract be performed. As it is not possible for you to change the place of manufacture of the car, the monetary equivalent of performance must be given instead. If the contract had been performed, I would have had assets to the value of \$20,000: that is the position I would have been in if the representation had been true. As the car is actually worth \$12,000, I will be entitled to compensation in the sum of \$8,000.

It is obvious that the basis on which to select between the options given by the Act to the party whose consent was caused by fraud or misrepresentation is for the innocent party to ask which will deliver the best answer. Section 19, after all, gives the party whose consent was caused by fraud or misrepresentation, two options, and she is entitled to pick the one which offers the most. It follows, of course, that in the case of the car, she cannot rescind (and get her purchase money back) *and* claim the \$8,000 on top, for it is implicit in Section 19 that these are alternative, not cumulative, remedies.

It may seem from this example that the law is simple and clear; and indeed it is. The trouble is, in many cases today, and especially when these issues are argued about in the context of large and complex commercial transactions, the way in which the law applies to the facts can be less easy to see. The way to approach the calculation, however, is to remain calm and to remember that, just because the transaction was a complicated one, it does not follow that the rules of law which apply when it goes wrong are complex. They are not: they are mostly simple and mostly clear; and this is the basis of their real strength.

(i) Suing instead (or additionally) for damages in tort

Suppose in the previous example that the consent had been given by coercion, and not by fraud or misrepresentation. This would mean that the second paragraph of Section 19 would not be available as a basis for claiming financial compensation; and the only option given to the buyer by the Act would be to treat the contract as voidable. But suppose that the buyer were to decide that he did not wish to avoid the contract - there may be several reasons for this, not the least of which is the fact that it may involve time and effort which he does not have - but that the contract was still one which he would not have made if he had not been coerced to do so. Suppose he paid \$15,000 for a car which was actually worth \$10,000. Can he make a claim for \$5,000?

This is a difficult question. As a matter of instinct, one might argue that the answer should be yes, because the economic effect of a payment of \$5,000 to the buyer puts him, in effect, in the position he was in before the contract was made. Not surprisingly, the Act does not deal with compensation for the coercion or indeed with compensation for a fraud or misrepresentation other than where the party is insisting on performance of the contract. However, there may conceivably in Myanmar tort law be liability for damages in these sorts of situations. In many other countries of the common law world, the basis of a claim for damages in such a case would indeed be that the buyer was the victim of a tort, although it is not entirely clear whether there is a tort that extends beyond fraud and negligent misrepresentation to coercion.⁶² Moreover, a non-negligent misrepresentation, even though it may cause loss in this type of situation, is not a tort as such.⁶³

(j) Where the consent was caused by undue influence

It is necessary to deal separately with the case of contracts in which the consent was caused by undue influence, because the relief provided by the Act is slightly different from that applicable in the other cases of voidable contracts. Section 19A of the Act sets out the principles:

⁶² This would depend on the tort of intimidation, the existence and scope of which is very uncertain.

⁶³ Perhaps for this reason, in some jurisdictions there is a statutory discretion given to the courts to award damages instead of rescission for an innocent misrepresentation. For example, in England under s 2(2) Misrepresentation Act 1967. No power equivalent to this is stated in the Contract Act.

19A. Power to set aside contract induced by undue influence. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

The option to rescind (or set aside) the contract must in principle become available when the person who was under the influence of another becomes free and able to exercise independent judgment; and when the option to rescind the contract arises, the party to whom the Act gives that option may exercise it. The period within which they may do this runs from the date on which they were aware of contract and free of the influence which caused them to enter into it; and if they do not exercise their option within the period of three years specified by the Limitation Act,⁶⁴ which period is measured from this date, the option will be lost⁶⁵ and the contract will cease to be voidable.⁶⁶

The drafters of the Act obviously considered that contracts in which consent had been given because of undue influence may be different from coercion, fraud and misrepresentation, in that the person who rescinds the contract may have derived some advantage from the contract, even though he or she would not have entered into it if there had been no undue influence. It therefore allows a court to adjust the terms on which rescission is put into practice. The example is given of a contract made with a moneylender, who is in a position to dominate the will of the borrower and obtain an unfair advantage from him, say a rate of interest which is unreasonably high. If the borrower, freed of the undue influence, seeks to rescind the contract, it is possible - in the moneylending case, it is clear - that the party did derive some advantage from the voidable contract. The sense of Section 19A is that the extent to which the advantage gained was unfair or unconscionable, it should be returned to the party whose will had been dominated, but to the extent that the advantage gained would have been fair or conscionable, it should be allowed to be kept. Illustration (b) to Section 19A makes the point: the moneylending contract may be enforced, and the borrower ordered to repay, but substituting a fair rate of interest (he has had the money, after all) for the rate which was found to be unfair.

It may have been thought that this power - to re-arrange the terms of the contract so that they remove the unfairness but leave the basic contract intact - would have been useful in relation to coercion, fraud and misrepresentation. But the Act did not do this, and there is no sign that the courts did so either. Undue influence stands, therefore, slightly apart from the other reasons why a contract is voidable for no free consent.

⁶⁴ Limitation Act, Art 91.

⁶⁵ It might also be possible to argue that they have affirmed the contract and taken an objective decision to treat the contract as valid, and if this happens, the option to rescind will be lost before any question of limitation can arise.

⁶⁶ *Cassim Ebrahim Malim v Mariam Bibi* (1952) BLR 4 (SC). The decision, on the exercise of the option to rescind, sets aside the decision of the Appellate Bench of the High Court in *Mariam Bibi v Cassim Ebrahim Malim* AIR 1939 Ran 278, (1940) RLR 35; the facts as reported in the judgments suggest that something very peculiar had gone on but do not really explain what it was.

4.10 Restricting or excluding the options of the party whose consent was not free

It is obvious that the effect of fraud or misrepresentation on a contract may be dramatic. If we focus for present purposes on the option to rescind a voidable contract, it is easy to see that a relatively small misrepresentation, for example, may lead to the rescission of a very large commercial contract. Suppose I contract to buy agricultural land from you at a price which has been determined on the basis that the land is of a certain area, and the price should be so much per acre; and suppose that you have innocently misrepresented the area of the land, so that I have paid slightly too much. According to Sections 18 and 19 (and assuming the Exception not to apply), I can rescind the contract, even though the difference between the price I paid and the price I would have paid if I had known the truth is very small. For this reason, some legal systems in other parts of the common law world have enacted legislation to allow a court to remove the option to rescind the contract for (non-fraudulent) misrepresentation and to give the party whose option has been removed an appropriate sum of money. It would be a very useful power for a court in Myanmar to have, but it does not appear to have it at the present time.

In commercial dealings, but not only there, the negotiations may be long and complex, and the risk that someone will, at some point in the process, say something which is not completely accurate is a real one. If one observes that Sections 17 and 18 each - in certain circumstances - treat silence as though it were misleading speech, it becomes even more difficult for a party negotiating towards the terms of a contract to know what it is safe to say or to not say. For this reason, and possibly for other reasons as well, it is common in other parts of the common law world for one of the parties to 'agree' with the other that his consent was free consent, or to 'agree' that he has placed no reliance on anything the other party said or did not say, or to promise that he will not argue that his consent was given as a result of misrepresentation, and so on. There is a great variety in the forms of words used, but what they have in common is that they attempt to prevent a party from having recourse to principles such as those set out in Sections 14 to 19A. If they are used in a contract which is governed by the laws of Myanmar, would such a provision work in the way its drafters intend?

The answer is that we do not know. On the one hand, there is nothing in Section 14 to 19A. Section 1 of the Act does not help, for it says:

1. Saving. Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

The immediate question is whether a term of the contract which says, in effect, that the provisions of (say) Section 18 shall not apply to the contract is 'inconsistent with the provisions of' the Act. It might be said that as Section 18 does not expressly forbid the use of contract terms which would exclude its effect, there is no inconsistency in a contract term which has that effect. On the other hand, it might be said that as Section 18 does not say 'unless the parties have provided to the contrary...', the Act does not allow the parties to draft a contract in such a way that one of its terms would

prevent the operation of Section 18. Or, to be more precise, the parties may draft it but the court will not give effect to it.

The uncertainty which results from this issue is a problem for parties who make contracts which will be governed by Myanmar law. That is not to say that Myanmar law would be improved by allowing parties to draft their way out of Sections 14 to 19A, or to allow an innocent party to give up the protection which these provisions confer on him.⁶⁷ After all, if a party signs a contract in which he says that he has not been coerced and entered into the contract of his own free will, the court could hardly be expected to take the wording of the contract term at face value and give effect to it if there was evidence of coercion.

Moreover, in those systems of the common law world which do give some effect to contract terms of this kind, it has still been necessary to impose some statutory control mechanism to prevent the unfair or exploitative use of such terms. If a party is required to accept a contract term in which he says that he did not rely on any representations made by the other party, and confirms that his decision to give his consent was based entirely upon his own researches, there is a chance that this term was imposed by a powerful or experienced party on a weaker or inexperienced one. It is not very attractive - though it is not impossible - to suggest that Section 16 itself (on undue influence) could itself be used to deal with oppressive clauses of this kind; and the better conclusion is that the proper authorities in Myanmar should consider whether the law on contract terms excluding rescission and compensation for, for example, misrepresentation is in need of reform, at least in connection with contracts made by consumers and other parties whose bargaining position is weaker than that of their counterparties.

⁶⁷ The suggestion that a contract term could be drafted to exclude the rights resulting from the fraud of the other party would be particularly unattractive.

5

What the Contract Terms are, What they Mean, and Who can Enforce them

Unless there is no dispute about it, a court will need to identify the express and implied terms of contracts; it will have to decide how to interpret or give meaning to them; and it will need to identify those who can enforce (or are in some other way affected by) the contractual obligation

We have reached the point in our analysis of the formation and creation of contracts at which we are able to say that the parties have formed a contract which is valid and enforceable as a matter of law. We now need to examine a collection of rules and principles which are used to clarify, explain, elaborate and understand the terms of the contract in various respects. We examine the contents of the contract; the meaning of its terms, both written and unwritten; the question of ambiguity or incompleteness or incoherence in the terms of the contract; the problem which arises if it is said that one party did not realise the presence or meaning or effect of a term in the contract; the correction or rectification of written contracts which do not accurately record the agreement the parties actually made, and so forth. And we will consider, explain, and understand who is (and who is not) affected – that is, bound by and entitled to enforce – a contract which has been made. There is a degree of untidiness in this collection of issues, but the exercise on which we are about to embark is to understand, as fully and completely as we can, the meaning and effect of the contract which the parties have made. Only once that has been done will it be possible to examine issues related to the performance and the non-performance of the contract.

In principle, a court called upon to enforce a contract is required to do a number of things. It must identify the terms of the contract, starting with the express terms. In the particular case of contracts made in writing or required by law to be made in writing it may be contended that the written document is not an accurate record of the express terms; the court may, if the conditions set out in the Specific Relief Act 1877 are met, rectify and correct the express terms of written document. Once the express promises or terms of the agreement have been identified, the court may consider whether additional terms should be included in the contract, added to the express terms, by implication of law, fact, custom or trade.¹

¹ *Steel Bros & Co Ltd v Tokersee Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372 (on the relationship between trade custom and the terms of a written contract although that case was concerned not with implied terms but with interpreting the express terms in line with trade custom).

The court must also interpret or construe the terms of the contract. This requires the court to ascertain what the express terms mean, individually, but also as a set of terms making a single contract. In other words, the terms must be interpreted in the context of the whole contract as well as in the factual context in which the contract was made. The court may be assisted by general principles of interpretation which the common law uses to help a court clarify the meaning which the court should ascribe to the term in question. When the court is seeking to ascertain the meaning of the terms of the contract, a question may arise as to whether it may look outside the contract, to other material which, according to one or another of the parties, may help it understand what a term was intended to mean. The law on this point may not be wholly clear, but we will seek to explain when the court may, and when the court may not, use material from outside the contract as part of the exercise of ascertaining the meaning of the terms of the contract.

Although in many common law jurisdictions, implied terms and interpretation are very important components of litigation about contracts, it is striking that the Contract Act says almost nothing about them. Although we will need to keep an eye out for the intervention of the Evidence Act, for the most part we will need to fall back on more general common law principles.

In this chapter, we will address the following points:

1. Express promises or terms, and implied promises or terms, in general;
2. Express terms: incorporation from other documents;
3. Express terms: rectification of express terms in written contracts;
4. How does one decide whether there are implied terms?;
5. Interpretation of contractual terms or promises;
6. The relevance or use of negotiation material and correspondence;
7. Notice, awareness, and ignorance of terms;
8. Control of terms which appear to be unfair, unjust or unreasonable;
9. Parties and non-parties: the concept of privity;
10. Altering the parties to the contractual obligation.

5.1 Express promises or terms, and implied promises or terms, in general

The promises which form the terms of contracts are either express or implied. This uncontroversial proposition is set out by Section 9 of the Act:

9. Promises, express and implied. In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Although the Contract Act does not refer to express or implied 'terms', it is clear that the references in the Act to express and implied 'promises' are being treated as embracing 'terms' within a contract as well as the central set of promises that we tend to focus on when considering the formation of a contract. So although Section 9 may

be thought to be establishing that a contract may be made by conduct as well as by words – and in that sense the promise(s) in question may be implied from conduct – it is also making clear that the terms of a contract may be implied as well as express.² It is clear, therefore, that agreements, and contracts, may be made up from express terms or promises, implied terms or promises, and (as is by far the most usual) a mixture of express and implied terms. That Myanmar contract law accepts and embraces the idea of an implied term is further made clear by the references in the Sale of Goods Act 1930 to implied terms.

What then is an example of an implied term? We can take a simple example to stand for the general point. A contract for the sale and purchase of a bicycle may be made by parties who negotiate and agree the price and the date of delivery, but who do not discuss or say or agree anything else. The express terms or promises of the contract may therefore be rather few in number, but the Sale of Goods Act 1930 provides that certain additional terms are implied into the contract, for example, as to the quality of the goods, even though neither party mentioned them, and even though neither party was aware of the fact that the law would do this. Sections 14 to 17 of the Sale of Goods Act provide that certain terms – some said to be conditions, others warranties – are implied into the contract of sale, so that these implied terms take effect as promises, even though neither party may have realised that the law was taking control of their contract, and adding to its express terms, in this way. The idea that contracts are often formed from express and implied terms together is, therefore, obvious.

In many cases, almost all of the terms or the promises of the contract will be implied. The larger question, which we will address in due course, is: implied how, or when, or on what basis? When I hail a taxi and tell the driver where I want to go, and we agree a price, we have a contract for the carriage of a passenger, but very few of the terms are express; all the others will have to be implied. If I squeeze onto a public bus and hand over 300 kyats to the conductor, and neither of us says anything to the other, we have formed a contract for the carriage of a passenger, but no promises have been made in words, because neither party needed to say anything to understand the position of the other. All the terms of our contract, all the proposals, promises made and accepted, are implied promises and implied acceptances. In other words, we make contracts every day which include implied terms, or in which *all* the promises are implied rather than express. It is therefore necessary to understand and explain the circumstances in which, and the basis or bases upon which, the law considers that a promise, which neither party put in words and expressed to the other, is implied into a contract which the parties made.

The law needs a mechanism for ascertaining the promises or terms of a contract which has been made without many, or perhaps even any, of the promises bring

² For example, *Mohamed Ismail v The King* (1940) RLR 468, AIR 1940 Ran 252 (implied term that seamen's voyages would be ordinary commercial passages, not in a vessel liable to sunk by enemy action). It is not just a rule about commercial contracts: a promise to marry can be implied from the circumstances of the case where the words used are rather indirect: *Mg Shwe The v Ma E Bon* AIR 1923 Ran 128, though this may in fact be better understood as a case on the interpretation of the words which were used.

express promises. It is also necessary that it has a mechanism for filling in gaps which may be thought to have been left by the express terms or promises of a contract which is made (or, if written, drafted) in concise form; and it is surprising that the Contract Act says nothing about whether, when, and why terms are implied into contracts. By comparison with the style preferred in some other jurisdictions of the common law, it appears that written contracts drafted in Myanmar are very much shorter than one might expect. A written contract for the transfer of land, for example, may be little more than a page or two in length; a written contract of employment may be even shorter. Yet the number and range of legal questions which can arise during the employment relationship, or which may arise during and be said to continue after the employment - such as, for example, the degree to which an employee must work for the benefit of the employer and not for others, the question whether a former employee is free to use or exploit information which was acquired while employed - may not be covered or answered by the express terms or promises of the written contract; and in any case, it must always be remembered that the contract is not the writing; the writing is the evidence of the contract.³ In the absence of a convenient statute like the Sale of Goods Act 1930 to fill in some of the missing detail, the question is whether, and if so, in what circumstances the law allows promises or terms to be implied into a contract. Section 9 clearly says that it is possible for this to be done; it does not indicate at all clearly how and when it may be done, or when or why it may be prohibited. In the course of this chapter we will need to examine in greater detail the law on promises or terms which are implied into contracts.

An important concern in this chapter will be the extent to which the law allows evidence of oral discussions, or of agreements made (or said to have been made) orally, or of documents produced before the agreement was made, to be tendered in court to challenge or contradict the express terms of a contract reduced to a written document.⁴ Myanmar contract doctrine on this point must be read subject to the Evidence Act 1872, which contains some rather tricky provisions which are applicable to contracts made in writing or required by law to be made in writing. We will say something about these at the appropriate point.

5.2 Express terms: incorporation from other documents

In some contexts, particularly in the field of commerce, it is common for a contract to make an express reference to another document (which may be a contract, but which need not be a contract) and to 'incorporate by reference' part or all of that other document into the contract which the parties have made: the effect is that the terms so incorporated become express terms of the contract. This can be done when the terms set out in the document which are to be incorporated are not inconsistent with the express terms of the contract into which they are to be incorporated. Where

³ *Isaac Abraham Sofaer v RP Wilcox* (1903-04) LBR 326.

⁴ *Isaac Abraham Sofaer v RP Wilcox* (1903-04) LBR 326.

the document from which the terms are to be imported is another contract, as may be the case with insurance and reinsurance, or the sale of goods to a distributor within the framework of an overarching or umbrella agreement to distribute the goods, it will not be surprising if the contract incorporates some or all of its provisions. A contract made in the context of a particular trade may provide that it incorporates the standard terms of a trade association or body of which one or both of the contracting parties is a member. A contract of employment may provide that it incorporates the terms of an industry-wide agreement which is supposed to regulate the terms of such employment. So also in the case of building and construction, where a sub-contractor may make a contract by which he agrees to provide services 'on the terms and conditions as applicable to the main contract'. By this language, and by language which has the same effect, the sub-contract borrows and includes within its terms from the main contract, which then become terms of the sub-contract.

The principle is easy to understand: if parties to a contract wish to agree and contract in such a way, there is no reason why they should not do so. The particular question which will need to be addressed is whether the words which purport to incorporate material from another source or document are sufficient to do so. They will need to be sufficiently clear. If a contract refers to a document and states that it shall form part and parcel of the contract, or that all the terms and conditions of the document will be incorporated into the contract, or that the contract will be governed by the provisions of the other document, that should suffice to incorporate the terms of the other document or contract. On occasions it will be necessary to make minor adjustment to the terms which are to be incorporated. Suppose a contract between A and B provides that the terms of the contract between B and C are incorporated into the contract between A and B. If the contract between B and C had provided for the arbitration of disputes, it is not obvious that this term could be incorporated into a contract between A and B. It will depend on how the arbitration clause in the contract between B and C is drafted, for a term which provides that B shall arbitrate disputes with C will make no sense in a contract between A and B. Questions of this kind are not always easy to answer, but the guiding principle should be that if the court is satisfied that the parties did intend to incorporate terms from outside their contract into it, they are free to do so, and a court should probably support, rather than find fault with and undermine, their attempt.

5.3 Express terms: rectification of express terms in written contracts

If the parties have recorded the express terms of their agreement in a written document, the court is likely to consider this to be conclusive so far as these express terms are concerned. But if it is alleged that there is a discrepancy between the express terms recorded in the written document as having been agreed to, and the express terms which were agreed to by the parties, the court has power to rectify the written document to remove the discrepancy. Its power is conferred by the Specific Relief Act 1877, Section 31 of which provides as follows:

31. When instrument may be rectified. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third parties in good faith and for value.

Because the policy of the law is to encourage parties to record the express terms of their agreement in writing, the law on rectification places a reasonably high hurdle in the path of the party who contends that the written record is inaccurate: the fraud or the mistake in recording the express terms must be clearly proved. By this means the law makes it more difficult for a party to challenge the written record of the express terms agreed to; but if the court is sufficiently satisfied that there has been such fraud or mistake, then there is no good reason for the law to treat the defective written record of the agreement as conclusive and the argument in favour of correction of the written document is overwhelming. In those circumstances the court has a power to order that the written contract or document be rectified.

Say, for example, the written terms of the contract provided that the borrower would pay simple interest, but the lender is able to show that this was a fault in transcription and that there was an express agreement that interest should be compound, not simple. The written record of the agreement will, by mistake, not have been a true expression of their intention and a suit for the rectification of the written contract may be brought and the erroneous written term corrected by order of the court. Likewise, if the written contract had said that the borrower would pay interest, but the lender was in a position to show the court that there had been an agreement to pay compound interest, as a result of which the writing of 'interest' in the contract was not a true record of the intention of the parties, the inaccurate written term may be rectified by order of the court. It is made clear by Section 33 of the Specific Relief Act that the court is not confined to asking what the language in the written document was intended to be, but may (and probably should) enquire into the intended meaning and legal consequences. However, this simply means that the court will seek to align the wording of the document with the agreement which it finds the parties made but which, through fraud or mutual mistake, was not written down.

Sections 91 and 92 of the Evidence Act provide in effect that where the contract is reduced to a written document, the express terms of the contract are to be proved by the document, and not by other means. The court will not admit evidence of an oral statement or oral agreement which would have the purpose of 'contradicting, varying, adding to or subtracting from' the express terms recorded in the document.⁵ This salutary rule also underlines the policy of law which is to treat written

⁵ But where it is sought to show that there was no contract at all and the document represents nothing, oral evidence may be given: *Abdul v Arlin* AIR 1926 Ran 94; where it is sought to show that the party to the written contract, in addition to contracting for himself, contracted as agent for his partners, oral evidence to this effect may be given: *E Hoe Chan Co v Baboo Chotalal Ujamsi* (1939) RLR 622, AIR 1939 Ran 139. This is because neither involves 'contradicting, varying, adding to or subtracting from'

documents and written contracts with proper respect. However, it has never been suggested that this rule prevents the rectification of contracts, even though it may be said that the effect of rectification by the court is that the previous written record is contradicted or over-written. The explanation appears to be that if there is a written contract, the court is bound to treat the express terms as conclusive unless and until the court exercises its statutory, discretionary, power to rectify the written terms to correct them. In other words, a party may apply to the court for the exercise by the court of the power to rectify the contract, but it may not simply challenge the conclusive nature of the written record of terms without a formal application made under the Specific Relief Act.

5.4 How does one decide whether there are implied terms?

As was said above, the fewer the express promises or terms in a contract, the greater the need to look beyond the express terms to answer questions which may arise between parties or for decision by the courts but which cannot be answered by reading or interpreting the express promises or terms. Section 9 regards such promises or terms, read into the contract in such circumstances, as implied promises or terms. At this point we need to understand the circumstances in which the law allows or requires promises or terms to be implied into a contract; we will also need to check whether the Evidence Act places any restrictions on the rules of the common law about the implication of terms as they will apply in Myanmar.

(a) Promises or terms implied into the contract by force of law

As we have mentioned, in certain contexts, statute law implies into a contract certain promises or terms which the parties have not themselves mentioned. It is obvious that if the parties make a contract for the sale of goods, then as the written laws of Myanmar contain a statute which imposes certain terms – as to title to the goods to be sold, as to their quality and their correspondence to description or sample – on the parties to such a contract, the statute adds to the terms of the contract. As these terms were not expressed by the parties, Section 9 considers them to be implied terms. They become part of the contract because a rule of law provides that they do, and for this reason they are sometimes referred to as terms ‘implied in law’, so as to distinguish them from other terms which may be implied for a separate reason.

Terms implied by law are almost always implied into, or imposed onto, a contract by force of a statute. Terms may also be implied in law as a matter of common law where necessary (as a sort of ‘default rule’) for the particular type of contract or relationship. A classic example is the implied term of trust and confidence that is implied

the written terms of the document. And an oral agreement to postpone the coming into effect of a written agreement is admissible, as an agreement to postpone the coming into effect of a written agreement is not the same as an agreement to defeat it: *Rowland Ady v Administrator-General of Burma* (1938) ILLR 16 Ran 417, (1938) RLR 417 (decision of the Privy Council on appeal from the High Court).

into all contracts of employment. It is not clear whether such terms implied by the common law exist in Myanmar. But it seems highly likely that, for example, in a contract for services, there will be a term implied by law that the services will be carried out using reasonable care and skill.

(b) Promises or terms implied into the contract because of the facts

Quite separate from promises or terms implied into or imposed onto a contract by a rule of law are those promises or terms implied into a contract because of the circumstances of the individual case. These are sometimes referred to as terms 'implied in fact', but what this actually means is that the term or promise is implied because that reflects the objective intention of the parties to this particular contract. The question therefore arises as to the circumstances in which a term or promise, which is proposed to be implied into the contract, will be implied; the question is what the court must ask itself in order to decide whether the term or promise is to be implied.

Two possible bases for implying a term are found in common law systems generally. It is not clear that they have been approved in Myanmar, but there is no obvious reason to think that a Myanmar court would come up with a different answer. One way is to ask whether the term proposed to be implied is so obviously intended to be included that, if the parties had been asked by an 'officious bystander' at the time they made it whether they intended the proposed term to form part of their agreement, they would both have replied that 'of course' they did. If for example a contract of loan is made which contains no express promise or term that the loan will be repaid, a term providing for repayment will inevitably be implied; it is less clear whether the implication will extend to the date or type (single sum, instalment) of repayment. Some of these cases do involve a rather artificial enquiry, and involve a rather contrived answer: for if the parties are now litigating against each other, it is likely that if the question of their intention were to be put to them, they would be less likely to agree the answer to the question. But that is not the correct approach. Rather the court must ask itself a more abstract question, which is what the parties would have said when they were in a state of agreement, and before they fell into disagreement. In other words, one must look at the position at the time the contract was made.

An alternative way to address the issue is to ask whether it is necessary to imply the term as a matter of 'business efficacy'. That is to say, if the contract will not be workable without the implied term, a term may be implied into the contract to save the contract from this fate.

There is obviously some room for disagreement in the context of individual cases, and it is important to remember that a contract is formed by the agreement which the parties made, rather than by the agreement which the judge would have made if the judge had been one of the parties. A contract may not lack business efficacy just because a differently-worded contract would have operated rather better (and anyway, who is to be the judge of what is better and what worse in circumstances like this?). The court does not have general power to improve the contracts which the parties actually made, or to make for them a contract which the parties did not

make. The court has no power to imply a promise or term because it would, in the court's opinion, be reasonable for it to have formed part of the parties' contract. This point is important and it deserves to be repeated, over and over again: the contract is the preserve of the parties, not of the court. They designed it, and they made it; and if their consent was free, the duty of the court is to respect it. The court should always remember that the question is what the parties did or intended to do; the question is not what they would have done better to do, or should have done instead. But the court does have a power to clarify the precise content of the contract which the parties did actually make, and the law on the implication of terms, to which Section 9 makes general reference, is part of that process.

(c) Promises or terms implied into the contract by usage or custom

Section 1 of the Act provided for the continued application of any usage or custom of trade, and therefore, in line with other common law systems, the Contract Act is likely to recognise a promise or term being implied on the basis that its presence in the contract is consistent with trade usage.⁶ Where parties deal and make contracts in the context of a particular trade, they may do so in shorthand form in which even less is expressed than it might otherwise be, because each side understands the trade background against which the agreement is made. If, therefore, there is a trade usage as to the date of payment, or about the grounds on which payment may be delayed, a term corresponding to that trade custom or usage will form part of the contract between the parties.

It would seem likely, therefore, that whatever is prescribed by a trade usage is treated as though it were an additional term of the contract, unless excluded by an express term of the contract.⁷ It is generally necessary at common law to show that the parties to the contract were sufficiently experienced in, or familiar with, the trade and its customs, for the presumed basis for this rule is that the parties are taken to have contracted against the background of the custom.

(d) Implied terms cannot contradict express terms already in the contract

A court cannot imply terms where to do so would contradict the express terms of the contract which the parties made.

If the law on implied terms or promises requires us to know with precision what the express terms of the contract mean, because a term cannot be implied if it will contradict the express terms, we will need to interpret – extract the meaning from – the express promises or terms in the contract. Although at a high level of generality, it may be said that the issues of interpretation and implication are all part of the single

⁶ See also, in the context of written contracts, Evidence Act, s 94, *Proviso* (5).

⁷ Whether custom can be used to override the clear terms of a contract reduced to writing is unclear: see *Steel Bros & Co Ltd v Tokereese Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372 (where the court considered the alleged trade usage or custom to be unproved).

exercise of deciding what the contract as a whole means, such an observation may not be helpful to a court which needs to decide what the parties did expressly promise and agree *before* it can decide whether terms may be implied by reference to Section 9. We therefore need to deal separately with the interpretation of the express terms of contracts. Put another way, as a practical matter, it is best to regard interpretation and the implication of terms as separate exercises with the former dealing with what is there in the contract and the latter dealing with what is not there.

(e) Implication of terms prevented by express term against implication

The parties to a contract, especially one which is reduced to writing, may be aware that the law does not preclude the implication of terms into such a contract (though it may make it subject to some restrictions), but may wish to ensure that no terms will be implied. In modern commerce the parties may wish to protect themselves from the uncertainty, as they may see it, of the law on the implication of terms. Can the parties exclude the implied terms that would otherwise be implied? One might argue that the answer should be 'yes'. If the court were to imply a term in the face of such a provision, it would be doing so directly contrary to the express terms of the contract; and in the absence of some good reason why they should not be allowed to do so, parties who choose to exclude the power of a court to find that their contract contained an implied term should surely be permitted by law to do so. It is their contract, after all. That all being said, there may be cases in which such an exclusion might be very unfair, and it is not clear, for example, that the terms implied into a contract for the sale of goods by the Sale of Goods Act 1930 can be excluded. But even accepting that exclusion of an implied term will often be possible, it would be essential that the exclusion clause does make it clear that it is excluding or barring the incorporation of terms which would otherwise be implied into the contract.

(f) Implication of terms into contract made in or reduced to writing

If a contract has been made in writing,⁸ Section 91 of the Evidence Act requires the express terms of the contract to be proved by reference to the document which records those terms; and if the express terms have been proved by the document, Section 92 limits⁹ in a severe way the circumstances in which oral evidence may be given by a witness, or taken by a court, to contradict, vary, add to or subtract from the express terms of the contract. The philosophy of the law is plain and compelling: if parties choose to reduce the express terms of their contract to writing, they say to each other that they are treating the written document, and not the discussion which may have preceded it, as the conclusive record of what was agreed.

These provisions of the Evidence Act do not affect contracts made orally, but they reinforce the conclusive effect of writing as evidence of the express terms to which

⁸ It is obvious that if it has not been so reduced to writing, there is no bar to the admission of oral evidence: *Maung Myat Tha Zan v Ma Dun* (1924) ILR 2 Ran 285 (oral contract for the sale of land).

⁹ And subject to six provisos set out in the Act but not reproduced here.

the parties agreed. However, the Act does not prevent the implication of terms, as distinct from the proof of the express terms agreed by the parties.

5.5 Interpretation of contractual terms or promises

We now come to the task which occupies the greater part of most trials concerning contracts, and which forms the basis for most arguments about performance and non-performance, justification and non-justification, obligation and non-obligation, and so on: the task of ascertaining, in those cases in which it is not agreed between the parties, the meaning of the terms or promises which comprise the contract. At this point it is assumed that the express terms or promises have been identified. If and insofar as there are disagreements between the parties as to the meaning of those terms, the rules which we are about to examine will be deployed to resolve the question. Although they are not strictly separate, we can organise the main threads which make up the law under three headings.

(a) The purpose of interpretation; the objective intention of parties

The overriding or ultimate purpose of interpretation of contracts is to ascertain the mutual, or common, or shared, intention of the parties to the agreement: to ascertain the meaning of the words used, in order to be able to determine their effect in law.¹⁰

The court will sometimes say that its purpose is to discover the actual intentions of the contracting parties. This might seem to be a perfectly reasonable thing to do, given that the aim of the law of contract is to allow the parties to make a contract on such terms as they agree, and to enforce that contract. However, it would not really make much sense for the law to require a court to investigate what was actually in the mind of the parties at the time of the agreement: even if it might appear to make sense in principle, it would make no sense in practice, for we would be asking the court to do the impossible. Instead of trying to look into the minds of the parties, the law ascertains the intentions of parties from external observation of their writing, their expression, and their other acts. It presumes that they had the intentions which a reasonable person looking on, and knowing the circumstances,¹¹ in which the contract was made, would consider that they had.¹² After all, if a contract is made on a person's behalf by a legal representative, it would be pointless to try to decide what the contracting party himself intended. In order to keep the task of the court within a manageable compass, the law requires the court to make an objective assessment of

¹⁰ It is not always easy if the parties have used contractual documents to which they appear to have paid little actual attention: see for example *Wor Moh Lone & Co v Japan Cotton Trading Co Ltd* AIR 1929 Ran 80, (1928) ILR 6 Ran 744.

¹¹ *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, (1936) ILR 14 Ran 347.

¹² For example, in *Ah Kwe v Municipal Committee of Thaton* AIR 1930 Ran 16, (1929) ILR 7 Ran 441, the court refused to interpret the offer by the Committee of a licence to run a pawnbroker business as including a promise by the Committee that the Commissioner – not party to the offer – would not exercise his powers to revoke it: the principle seems to one of asking what a reasonable interpretation of the offer would be.

the intentions of the contracting parties. It requires the court to ascertain what the parties intended from the terms which they chose to make up their contract; the court looks for 'intention according to outward appearances', or 'intention according to the terms'.¹³ It may also ask what the words used by one party would be taken to mean by a reasonable person standing in the shoes of the other party.¹⁴

A question of uncertainty or ambiguity in the meaning of the words of the contract may be resolved by looking at surrounding circumstances, for 'in looking at the contracts to find their true meaning, the surrounding circumstances must of course be considered'.¹⁵ After all, the parties did not make a contract in the abstract; rather, the question we need to ask is 'what was the meaning of the contract which they actually made?'

A similar approach may be taken when a court is required to determine the legal nature, or characterisation, of a contract.¹⁶ So for example, if contracts for the sale and purchase, and resale and repurchase, of rice are made, they may be said to be speculative and valid, or wagers and therefore void. The court does not just look at the terms of the contracts in the abstract, but looks at them in the broader context of the circumstances in which they were made in order to decide upon their true meaning and legal nature.¹⁷ Contracts of this kind made between a miller and a rice trader, each covered in dust and sweat, may be speculative, but will not be wagers. An identical set of contracts made between two financiers in suits in air-conditioned offices, who have no idea what a sack of rice looks like, may instead be a wager. The meaning and nature of the contract depends on the circumstances, or on the circumstances which are apparent to the reasonable man.¹⁸

If the parties have expressed their intentions in writing - and unless there is a basis for instituting a suit to rectify the written document to correct an error in the writing - the court will look to the writing in which the express terms are recorded.¹⁹ If the

¹³ In this respect it may be helpful to remember that the task of the court is not to do *justice*, but to do *justice according to the law*. The two ideas are related, but are quite distinct. So also with *intention*, and *intention according to the terms*.

¹⁴ *Mg Shwe The v Ma E Bon AIR 1923 Ran 128* (oblique language which would be interpreted as a promise to marry). The two parties were Karens; the question posed by the court for answer was what a reasonable Karen listener would take the words spoken by the Karen speaker, to mean.

¹⁵ *Mohamed Valli Patel v The East Asiatic Co Ltd AIR 1936 Ran 319, (1936) ILR 14 Ran 347; U Nyo v U Ko Ko Gyi (1950) BLR 147 (HC)*.

¹⁶ The court may decide that a written agreement created a lease even though the parties called it a licence, for the substance, not the label applied to it, is what counts: *SR Raju v The Assistant Controller of Rents, Rangoon (1950) BLR 10 (SC)*.

¹⁷ For example, it may need to decide whether is presented to the court as a contract to sell and (later, after payment of rather more money) repurchase property is in fact a mortgage to which particular provisions of the Transfer of Property Act would apply: *Ma Mon v U Min Sin (1964) BLR 427 (CC)*; also *U Choung Po v U Aw (1961) BLR 395 (HC)* (to determine whether transaction was sale or gift).

¹⁸ *Mohamed Valli Patel v The East Asiatic Co Ltd AIR 1936 Ran 319, (1936) ILR 14 Ran 347*.

¹⁹ It will assume that the real intention of the parties is to be found by giving each and every term of the written contract its ordinary and natural meaning: *Tan Byan Seng v Ellermans Arracan Rice & Trading Co Ltd (1948) BLR 148 (HC)*; *Steel Bros & Co Ltd v Tokessee Mooljee AIR 1932 Ran 162, (1932) ILR 10 Ran 372*; *The State Agricultural Marketing Board v U Ba Chein (1960) BLR 405 (HC)*. But it will interpret the written document as a whole, and will not look at the meaning of a single term in artificial isolation from the rest of the written document: *The Mineral Resources Development Corp v U Ba Yone (1965) BLR 856 (CC)*. See also, on whether the document showed that an agent contracted to be personally liable *Rangoon Commercial House v Shahjehan Mustikhan Trading Corp (1955) BLR 35 (SC)* at 39-40; *Ranchhoddas Jethabhai & Co v The State Agricultural Marketing Board (1957) BLR 30 (HC)*, at 41-48.

meaning of the written words is clear, it will not allow oral evidence to be given which seeks to show that those written words were not intended to have the effect which they do appear to have.²⁰ Although the primary purpose of Chapter 6 of the Evidence Act is to prevent a party using oral evidence to attack the conclusive nature of the written terms of a contract reduced to writing, it also makes sense for it to prevent oral evidence being deployed to suggest to the court that the words in which the parties framed their agreement do not have the meaning which the court would consider them to have, or to show to the court that the true nature of the agreement reveals the written document to be a sham.²¹

(b) Uncertainty as to the meaning of terms

On occasion, it is not clear whether the express terms of the contract mean one thing or another. If a contract is made between a Myanmar entity and an Australian entity, and it provides for the price to be a certain sum in 'dollars', the use of the term 'dollars' may not make it clear whether the reference is to US or to Australian dollars. In a case in which neither party is a US entity, there may be a genuine question whether the reference to dollars is to the one currency or the other.

The surrounding circumstances and context²² will help to resolve the uncertainty. For example, if the parties have dealt previously, and the currency of account has been US dollars, the court will be entitled, and likely, to conclude that the words used did in this particular context mean US dollars. So also if the trade is in a commodity which is as matter of trade usage or custom always priced US dollars, as is the case with oil traded on the international market. A court may on occasion make use of the general principle that ambiguous language should be construed against the person who drafted it: in other words, it will be interpreted in the manner in which the person to whom it was communicated would have understood it, rather than in the sense in which the person who drafted it would have interpreted it. So for example, if I take my car for repair to a garage and agree to a contract term which provides that the garage shall have no liability for any loss or damage done to the car while on the premises, and the car is then lost when the owner of the garage hands the keys to a friend of his who drives the car away, does the express term of the contract cover this particular case? It is correct to say that there has been loss, but a reasonable man in the position of the customer might say that the normal meaning of 'loss', in circumstances such as these, means accidental loss or loss which could not reasonably have been prevented, rather than loss deliberately caused by the party who drafted the contract in the first place. The principle that ambiguous language should be given a meaning which supports the position of the party who was not responsible for drafting it but just read it, rather than the position of the party who formulated the term in the first place, seems sensible and accords with common

²⁰ Evidence Act 1872, s 94. See also *Steel Bros & Co Ltd v Tokersee Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372.

²¹ *Shio Karan Singh v Surya Nath Singh* (1959) BLR 207 (HC); *U Choung Po v U Aw* (1961) BLR 395 (HC); *U Kyaw v U Ah Chum* (1963) BLR 394 (CC); *Daw Thuang Chit v U Tun Hlaing* (1965) BLR 19 (CC).

²² Sometimes referred to, in English law at least, as the 'factual matrix'.

sense. It was used to explain why a dry cleaner could not rely on a term which sought to exclude his liability 'if things get torn' where the tearing was the result of carelessness or worse. It was conceded that a contract term could be drafted with such very wide effect, but this would need to be done in very clear language. A very general disclaimer of responsibility would be nowhere near good enough.²³

(c) Traditional maxims of interpretation

It appears that the Myanmar common law has traditionally used a number of general principles to help ascertain the meaning of contractual terms whose meaning was in legitimate dispute. It tended to summarise these in the Latin language, which is not especially helpful, but as these expressions still appear in the post-independence law reports, it is prudent to be aware of them. The rule of interpretation which we have just examined, that ambiguous words will in the last resort, be interpreted against the party responsible for drafting them, is the rule of construction *contra proferentem* (which literally translated means 'against the person putting it forward'). It is sometimes said that words should be interpreted in a way which will make the contract work in a commercially sensible way, and not in a manner which will defeat it: *ut res magis valeat quam pereat*.²⁴ So if something appears to have gone wrong with the language, a court may be able to find a meaning in it which saves the contract from a failure which neither side will have wanted at the time the agreement was made. It is sometimes said that where an item is mentioned specifically, this specific mention excludes the possibility of the meaning extending to other things. For example, in a contract to provide security for a building, an exclusion of liability for loss caused by flooding would not extend to loss caused by subsidence or by strong winds, still less by fire, even if these perils are all natural disasters, because to express one thing is to exclude other things which are not mentioned: *expressio unius est exclusio alterius*.²⁵ There is nothing wrong with these rules of guidance as to the proper meaning of terms in a contract, but they are no more than guidance to a court which is under no duty to apply them as though they had statutory force.

5.6 The relevance or use of negotiation material and correspondence

One of the ways in which meaning may be given to, or extracted from, the words of a contract is by looking at evidence of what was said and done in the negotiations which led up to the agreement. Some may say that the best way to make sense of a person's language is to look back at the way he has been using that language; and if

²³ *Hollandia Pimmen v H Oppenheimer* AIR 1924 Ran 356.

²⁴ Cited with approval and applied in *U Maung Maung v Daw Thein May* (1950) BLR 151 (SC); *Dr U Chit v Daw Ohn Yin* (1952) BLR 176 (HC) at 179.

²⁵ The maxim was applied, though in the context of construing the words of a statute, in *Leong Moh & Co v U Aung Mat* (1949) BLR 425 (HC), at 426.

one accepts that this may be correct, a court should be open to the admission of such material for the purpose of helping it extract the true meaning of the terms of the contract. In the context of the current enquiry, this is attractive, but there are also arguments that the attraction should be resisted and that a court should refuse any application to allow such material to be placed before it by one of the parties. Even though it may be said that all this material is part of the 'surrounding circumstances', and that a court should take notice of it, the counter-argument is that it is irrelevant to the meaning of the contract which was made, as it is 'evidence' of what was, at that earlier point, *not* agreed. According to this approach, it should play no part in the search for the meaning of the contract which was made.

There are arguably added reasons for this which are practical rather than theoretical. One practical reason is that in negotiation, parties may adopt all manner of positions, make all manner of proposals and counter-proposals. Every common lawyer knows that, until everything is agreed, nothing is agreed: that until there is an acceptance which conforms in all essential details to the terms of the proposal, either side can walk away, change its mind, resile from a position or adopt an entirely new one. Every common lawyer knows that the things said and done before the agreement is made have no effect on the meaning of the agreement, and that the agreement itself is the source of legal rights, unless the pre-contractual material can support a plea of misrepresentation or fraud or other wrong which leads to the voidability of the contract. It also means that parties may negotiate in a way which suits their interests, without needing to worry that something said in negotiations will come back and haunt them.

Another practical point is that the admission of this material for the limited purpose of trying to ascertain the meaning of the terms of the contract may lead to the court being overwhelmed with material, which may obscure (or be designed to obscure), rather than illuminate, the true meaning of the agreement admittedly made. It may also be difficult to admit the material as evidence for one purpose but not for other purposes. Commercial contracts in the modern age may be preceded by lengthy exchanges of correspondence, and if a court were to be required to comb through this in search of material which might suggest that a promise or term did not actually have the meaning which the court considers that it does have, it might be said that there would be no end to its work. This fear of swamping the court is a powerful reason for the traditional view that this material is not to be used as part of the exercise of ascribing a meaning to words, even if it might, in principle at least, be helpful. A theoretical reason for refusal to admit this material may be that it is irrelevant to the task before the court. The task of the court is to ascertain the meaning of the terms or promises which, as it has concluded, form the contract. Evidence as to what a party had in mind before the agreement does not appear to be relevant to the task which the court faces, quite apart from the fact that evidence of what one person says he intended is not evidence, still less proof, of what appears to have been agreed.

At all events, and although the question is controversial in a number of common law jurisdictions outside Myanmar, it would seem that for costs reasons alone (though there may be additional reasons) this material should at this stage in the development of Myanmar contract law not be regarded as admissible to prove the

meaning of the terms used in the contract. Even if it were thought to be helpful, the costs outweigh the benefits. Of course, evidence of pre-contractual agreement is admissible - indeed, it is essential - to support a suit for rectification of a written contract, but rectification is part of the exercise by which a court assembles the terms or promises which make up the contract. It is not relevant to the separate exercise of working out the true and legal meaning of the terms which have already been found to comprise the promises of the contract.

5.7 Notice, awareness, and ignorance of terms

It sometimes happens that a party to a contract, who does not deny that she is bound by the contract, and who is unable to argue that the contract is voidable for any of the reasons examined in the chapter on voidable agreements, still says that she should not be bound by a promise or term in the contract because she did not know about it, or had no reason to suppose that such a term was contained in the contract or (by reason of being illiterate or blind) she was unable to read the document which contained the term which is now to be enforced against her. If her consent to the contract - which means to a contract which contains this particular term - was unfree, because it was caused by fraud, misrepresentation or undue influence, she may exercise her option to avoid the contract. But if she was simply ignorant or unaware, is there anything which may be put forward as a basis for holding that the contract or term is not binding on her?

(a) Contracts made without signature

Take for example a contract to let and hire a piece of machinery at a particular daily rate. Suppose that the written contract contains a term which provides that if the hirer is late in returning it, that party will be treated as having extended the period of hire but for a sum of money ten times the original rate of hire. There may, of course, be a debate about whether such a clause is enforceable as a penalty clause under Section 74, and if it is, how much may be recovered, but is the fact that the hirer did not realise that this was a term of the contract relevant to the question whether it is bound by that term in the first place? Suppose the contract was made or evidenced in writing which was very small, or very faint and hard to read; suppose the hirer was (as the party letting out the machine knew) illiterate. Take another example: suppose a passenger boards a coach or a train, having purchased a ticket, written on a flimsy scrap of paper which says, in small print, that it is issued subject to terms and conditions, and that these terms and conditions would exempt the transport company from liability if a specified event were to occur.²⁶ If the passenger does not see the writing on the ticket (after all, not everyone reads the front and back of their train ticket unless they are a lawyer, and many lawyers do

²⁶ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC).

not do it, either), are the terms said to be incorporated binding on the passenger when something goes wrong?

The general answer of the Myanmar common law is that it all depends on whether the party who seeks to rely on such a contract term can be said to have taken reasonable steps, or have made reasonable efforts, to give the other party notice of the term or terms before the contract was made.²⁷ It is not necessary that the other party – say the customer, or passenger – actually knew of the term; rather it is required that they were given a reasonable opportunity to inform themselves of the full terms of the proposal. It is sometimes said that the harsher the term, the greater the effort which will need to be taken to give adequate notice for it to operate as a term of the contract, though the contrary view, that the rule is the same no matter how amazing the contents of the term, has also been expressed.²⁸ Where the term, or the warning of the existence of terms, is given by writing on a ticket, it may be that small print will not be sufficient; equally, if it is actually known that the other party is blind or illiterate, it may be that a written notice which would be effective in the case of an ordinary customer will not be sufficient in the special case.

(b) Contracts which are signed

Would it make any difference if the contract containing this harsh term had been signed by the hirer? Many common law systems have accepted that if a person signs a document, he is bound by its terms, and cannot complain that he did not realise how onerous they were, or say that he would certainly not have signed if he had known. So long as he has not been the victim of misrepresentation or fraud, but has simply signed his agreement, he will be bound. Of course, if the document is put before him and he is informed as to its contents in a way designed to mislead him, he may be able to rescind the contract, but that is not the case with which we are concerned here. A signature may well be taken as a conclusive statement which prevents any objection being taken at a later date.

Contracts signed by a party who is blind may be a special case, at least if the promisor knows of the blindness of the other. It may be that in such a case a court would be able to stretch one of the bases upon which a contract may be voidable to cover such circumstances, perhaps by reasoning that silence in the circumstances – not pointing out to a blind person the importance of the term in the contract which he is signing – is equivalent to fraud. However, even if this is not possible, it is hard to see that it would be in accordance with ‘justice, equity and good conscience’ to enforce such a term of a contract so that Section 13(3) of the Burma Laws Act 1898 may provide a solution.

²⁷ *U Hla Pe v Board of Directors of the Union of Burma Airways* (1951) BLR 347 (HC); *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC). In these cases the courts derived their answer from their understanding of the English common law as it then was.

²⁸ *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC), at 304. However, in that case the court was satisfied that the passengers were educated people who knew, or who had the means of knowing, of the term on which the airline later relied against them.

5.8 Control of terms which appear to be unfair, unjust or unreasonable

Terms of contracts are sometimes simply unfair. Terms which exclude or limit the liability of a seller or supplier if the goods prove to be faulty or dangerous may be found to be included in the contract, but it may appear to any reasonable person that the inclusion of such a term is disgraceful, for it takes advantage of contractual freedom in a way which verges on being an abuse. Terms in a contract of employment which provide that if the employee – say the person who operates the till – fails to reconcile the till record with the contents of the till, he will pay the shortfall out of his own pocket, or terms which allow the employer to deduct or forfeit the entire month's wages if the employee is late for work more than once in the month, and so on, are regrettably common.²⁹ Terms in a contract of hire which provide that if the hirer damages the equipment, not only will the hirer pay for the cost of repair but will be liable for the consequential losses sustained by the owner resulting from the fact that other business may be lost, are not unknown. Terms in a contract for the provision of services which allow the customer to decide, without any control over his decision, whether the work provided was of an acceptable standard and to have an absolute right to refuse to make payment if he considers the work to be sub-standard are also sometimes encountered. Terms which provide that if a purchaser of goods wishes to complain she has to do so within 24 hours of delivery, or has to provide photographic evidence, may be put into a contract for the sale of goods for the very purpose of 'protecting' a seller who has breached his contract to sell goods of merchantable quality from having to pay compensation for failure to perform his side of the contract. And terms in a contract of carriage which exclude any obligation on the carrier to pay (or any right of the passenger or his estate to claim) compensation even in the event that the negligence of the carrier causes death or personal injury are not uncommon.³⁰ The courts may have enforced them in the past, on the basis that they were part of the contract and that there was no more to be said about it, but it is proper to think again.

In these, and in a thousand other cases, the weaker party to a contract may be placed in a position which is unfair and unjust simply because that party could not match the contractual power of his counterparty. But times, and the legitimate expectations of those who make such contracts, may have moved on. Society develops, and so, sometimes, does the common law.

As we shall see, if such a clause is regarded as penal in nature, Section 74 may impose some limits on the extent to which it can be enforced. But the trouble with that is that the Illustrations to Section 74 all suggest that a term which operates 'by way of penalty' is one which comes into effect when there is a breach, and which makes the contract-breaker's position worse as a result.³¹ That means that Section 74

²⁹ See *Kumbha Haji Raghaw v Motichand Makanji Shah* AIR 1917 LB 31.

³⁰ *U Hla Pe v Board of Directors of the Union of Burma Airways* (1951) BLR 347 (HC); *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC).

³¹ See further, Chapter 8.9, below.

is not much use when the term does not require payment from a party who is in breach of contract. Accordingly, a term which imposes a charge for an additional deemed hire period might be controlled by Section 74, but one which limits or excludes altogether the liability of one party to the other in circumstances in which the Contract Act would otherwise allow for proper compensation, will not be regarded as a penalty, and Section 74 would not therefore apply.

It may be that Myanmar law has not had to deal with such terms in the past, or that if it has, the mechanisms by which it deals with them are informal. But the experience of the common law world beyond Myanmar has been that the freedom of parties to make contracts on terms which they choose can, in some cases, be abused when strong parties take advantage of the weak, and that mechanisms need to be found to prevent such behaviour. No doubt it is true that Myanmar law could take a simple and extreme position, that if the parties made a contract on particular terms, they should abide by and accept the consequences: indeed, there is some evidence that this has been the position,³² and may still be the position. Myanmar society expects people to pay their debts, and to abide by their contracts, and if the contracts contain severe terms, then severe terms must be complied with. But there is good reason to question this attitude, and to ask whether the general duty to perform contracts which are valid and enforceable, no matter how unfair they are, is suitable for the modern world which tends to accept that freedom of contract is a right which comes with obligations; a power whose exercise comes with responsibilities.

In countries outside Myanmar the law has developed in two ways. One has been that some judges have taken it upon themselves to 'discover' rules of common law which allow a court to place limits on certain contractual terms. The trouble with this is that such behaviour by adventurous judges is always controversial in a system in which the primary task of reforming the law is for Parliament not the judges but, in any event, judicial development of the common law is unlikely to be able to deal with all instances of abuse. A second has been that legislation, for the protection of employees, consumers, and others in inferior bargaining positions, has been enacted to authorise courts to strike out or to amend contract terms which offend against contemporary standards of what is acceptable in the particular context. The trouble with this is that parliaments tend to listen to the voices of the powerful more than they hear the voices of the weak, and that it can take a long time for legislation to be made, and even longer for satisfactory legislation to be made.

One possibility, as yet untried, is to argue that Section 13(3) of the Burma Laws Act 1898 may apply to require a court to ask itself whether it is in accordance with 'justice, equity and good conscience' for a contracting party to impose an unfair term on a weaker party, and to enforce it to the letter when the opportunity arises. The question is not whether the contract contained a term which would apply in the circumstances as they now are. Rather it is whether it is in accordance with justice, equity and good conscience to enforce the term or terms of the contract in the

³² *U Hla Pe v Board of Directors of the Union of Burma Airways* (1951) BLR 347 (HC); *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC).

present circumstances, and the answer to that question may be that perhaps it is not. The fact that there is no rule of Myanmar written law which provides for this to be done is no obstacle: Section 13(3) is there for those cases in which the written law is incomplete. And the great advantage of Section 13(3) may also be that it allows a court to develop and refine its sense of what justice, equity and good conscience require so that it reflects the way in which circumstances change.

A question which follows from this is whether there is, or may be, an obligation to negotiate agreements, or to perform contracts, in good faith. The common law has for a long time assumed that there is no such duty, and that there really could not be any such duty, in circumstances in which each party is expected to look after that party's own interests when negotiating, and each party is entitled to exercise the rights which the parties have agreed to create. But in recent years some lawyers have begun to wonder whether there should be a duty to negotiate, or to exercise rights, in good faith. To some extent the pressure to consider this question has come from the systems of the civil law, which have never been quite so sure that parties in contractual negotiation should be treated as if each was the opponent of the other, or that a contract may be enforced, and must be enforced, strictly according to its terms. A requirement of good faith operates as a limiting factor, in a way which should not interfere with those interests the law should respect, while providing a mechanism for the prevention of excesses.

The objection is obvious: that the definition of good faith is not clear and precise, and its application in a particular context may be very hard to predict. To put the matter in crude terms, what is regarded as bad faith in one context may be regarded as absolutely standard and unremarkable in another. In England and Wales, for example, the objections usually outweigh the arguments in favour of a requirement of good faith. The reasons focus on the practical uncertainty which the doctrine may give rise to, and on the fact that commercial parties may be deterred from choosing English law to govern their contracts, with consequent disadvantage to English legal business. This, however, may be a point of view which is quite distinct from the perspective of Myanmar law. The primary focus of the development of Myanmar common law should be on contracts made between ordinary Myanmar entities: the question for a court should be on whether the circumstances of Myanmar in the modern world mean that there should or should not be an overriding duty on parties to a contract to act in relation to each other in accordance with the requirements of good faith. That is not a matter on which a lawyer from outside Myanmar can easily offer an informed opinion, and for this reason none is offered here.

5.9 Parties and non-parties to the contract: the concept of privity

In all the cases considered so far we have assumed that the persons who created the contract, and the persons who are involved in litigation to enforce the contract, are the same. But there may be cases in which contracting parties A and B intend to confer a benefit on C (and C wishes to claim that benefit) or to impose a burden or restriction on C. The common law treats this broad issue of who, apart from the

contracting parties themselves, can be affected by the obligations created by the contract, as depending on the doctrine of privity. We will examine its place in the contract law of Myanmar by starting with the easier case in which contracting parties seek to create and impose burdens on another.

A word of explanation should be offered for treating the concept of privity of contract within this chapter, rather than in a separate chapter dealing with the identification of the parties to the contractual obligation. The reason for doing so is, as we shall show, that Myanmar contract law does not contain a doctrine of privity of contract of the kind historically found in³³ other common law³⁴ systems. How it happened that this restrictive (and frequently unwelcome) principle of the common law was not mentioned in the Contract Act is not known, but this fact allowed the courts of Myanmar to develop the contract law of Myanmar free from the unwelcome elements of the doctrine. The question, therefore, of who is bound by, and who entitled by, a contract is most conveniently considered as an aspect of the construction of the terms of the contract.

(a) Burdens created by a contract

The first half of the common law rule of privity is that only those who are party to the contract can be bound or burdened by it: it is not possible for A to promise B that C will perform an act or a service, with the consequence that B can sue C to require C to perform an act which C did not promise to perform, unless A is C's agent, authorised to make promises on C's behalf (as, for example, when B, who wishes to secure C's services, deals with A, the agent of C and who is authorised to give promises on C's behalf). Generally speaking, the common law elsewhere takes the clear position that burdens of contracts cannot be imposed on those who are strangers to the contract; and there is absolutely nothing in the Contract Act to suggest that Myanmar law takes a different view.³⁵

Suppose that A manufactures an industrial product which A sells to B, and in the contract with A, B promises that neither B nor any person to whom B may sell the product, will sell it at a price lower than that specified in the contract between A and B. If C buys the thing from B, and then sells it at a price lower than that specified in the contract between A and B, C is free to do so: C was not party to the contract; B did not contract with A as C's agent; and the idea that A and B can create and impose burdens on C is not tenable.

³³ And in those systems, frequently legislated out of.

³⁴ It is, however, reflected in civil law systems as well.

³⁵ *Mahanth Singh v U Aye* AIR 1936 Ran 514, (1936) ILR 14 Ran 336 (the fact that A, who has contracted with B, happens to be a trustee of a religious institution does not make the other trustees party to the contract unless A was authorised to contract on their behalf and did so. The other trustees are not liable as they are not parties; the claim lies simply against A in his personal capacity, whether or not the trust decides to help him out if he incurs liability). The further appeal to the Privy Council, *Mahanth Singh v U Ba Yi* (1939) RLR 358, AIR 1939 PC 110, (1939) 66 Ind App 196, dealt with the liability of sureties, and not with this point. It is the same if a person contracts with another who is a receiver: the receiver, as contracting party, is personally liable, though he may have a right of indemnity from the estate: *Rev Brother Patrick v Lyan Hong & Co* (1938) RLR 611.

Precisely the same reasoning applies if C knows that A, who sells property to C, had contracted with B to allow B to use that property for a period of time which has not yet expired: C is not affected or bound by the contract between A and B. If A agrees to let A's car³⁶ to B for a period of 12 months, but then sells it to C, then even if C knew of the contract of letting and hiring between A and B, B cannot enforce his rights against C, for C was not party to the contract of letting and hiring; the parties to the contract of letting and hiring cannot place burdens on C, and C has no obligations under the contract between A and B. If A agrees to sell a car to B, but before the sale is performed and title passed, A sells and delivers it to C, C cannot be sued by B. C is not party to the contract under which B derived rights to the car; and the fact that A is now liable to be sued by B for breach of contract is of no concern to C.

(b) Rights created by the contract

Traditionally, much of the common law world drew a similar conclusion about the rights created by the contract: the second half of the doctrine of privity is that only the parties to the contract can enforce the promises contained in the contract. According to this, if A promises to B that A will pay a sum of money to C, or do some other act which would be for C's benefit, C cannot enforce the promise of A, as C was not party to the contract between A and B.

It is, however, clear that Myanmar law does not adopt this view. Although there are references in the 1872 Act to the parties to the contract, there is nothing explicitly in the Act that prevents a third party, who is intended to be the beneficiary of the promise, from enforcing the contract. Nor is the rule, which is somewhat similar to that of privity – that consideration must move from the promisee or plaintiff – set out anywhere in the 1872 Act. On the contrary, the definition of consideration in Section 2(d) explicitly includes consideration that moves from a third party rather than from the promisee.

On three occasions on which the issue arose directly³⁷ before it, the High Court refused to apply this aspect of the doctrine of privity, holding that a non-party in the position of C could herself directly enforce the promise contained in the contract between A and B which was for her apparent benefit.³⁸ The judgments in these cases are plainly based on the view that the doctrine of privity was a restriction on the enforce-

³⁶ It is possible that the analysis is different if the property in question is land (see the Illustrations to Specific Relief Act, s 27(b)), but questions concerning rights and duties in relation to land are not within the scope of this book.

³⁷ It arose indirectly in *AKACTAL Chettyar v AKRMMK Firm* (1938) RLR 660, AIR 1939 Ran 84, which though it dealt with Section 63, which is not concerned with the formation of contracts but with their discharge, refused to allow the doctrine of privity to prevent a stranger to a concession by a creditor, in an agreement with two debtors to reduce the interest charged to all three debtors, from taking advantage of it. It is consistent in its general approach with the cases in which the High Court held that the common law doctrine of privity is not part of Myanmar law.

³⁸ *Ma E Tin v Ma Byaw* AIR 1930 Ran 172, (1930) ILR 8 Ran 266 (right of spouse to enforce antenuptial agreement made by parents for her benefit, following on this point *Khwaja Muhammad Khan v Hussein Begum* (1910) 37 Ind App 152, which may be considered to limit the scope of the decision to the enforcement of matrimonial contracts, though there is no real reason to support this. The fact that the spouse may be a minor does not appear to matter, because he or she is not a party to the contract);

ment of promises which was unnecessary in Myanmar; it is less clear whether the judges thought that their decisions were consistent with the English common law.³⁹ There is high authority, though from outside Myanmar, to contrary effect;⁴⁰ but the view taken by the Myanmar courts is attractive and sensible. Most countries of the common law have legislated to get rid of this element of the doctrine of privity which would prevent a third party from taking advantage of a promise made for his benefit. Myanmar law does not suffer from this problem, so that there is not the same need for reform.

This means that Myanmar contract law has rules for the creation and formation of contracts, but a separate set of rules to regulate the enforcement of the promises contained in those contracts once they have been made. As the High Court observed in 1953,⁴¹ Section 37 obliges the parties to a contract 'to perform or offer to perform their respective promises'. Nothing is more natural than to allow the person to whom performance must be delivered or offered to enforce the promise if this does not happen.

Once the contract has been properly formed in accordance with Chapter I of the Act, the subsequent, or consequential, question 'who may enforce it?' does not have to be answered by asking 'who created it?', for creation and enforcement are distinct processes. After all, there is no rule that a car can be driven only by the person who made it, or that food can be eaten only by the person who cooked it. Creation of a thing, and dealing with the thing which has been created, are separate events which may properly be governed by separate rules.

The fact that the doctrine of privity does not bar the claim when brought by C, however, only marks the starting point of another series of questions. For example: is it necessary that the contract state that C is intended to be able to enforce it in C's own name, or is it sufficient that C is someone who would benefit from the performance of the promise made by A? One would assume that the contract would need to specify, by an express or implied term, that C should be entitled to do this, but it cannot be said that this is yet established. For another, if C does enforce the contract, or seeks compensation for non-performance of the contract, it may be necessary to consider whose loss – C's or B's – determines the measure of compensation. If C did not provide consideration,⁴² some may argue that C suffers no loss if the promise made by A to B is not performed, or that if he did provide consideration, the consideration is all that is lost. But one would assume that C should be able to say that what C has really lost, the interest which C has lost, is the performance of the promise, and the value of this to C is what needs to be calculated. However, if C brings a suit against A for specific performance⁴³ of the promise made by A to B,

Daw Po v U Po Hmyin AIR 1940 Ran 91, (1940) RLR 237; *Burma (Government Security) Insurance Co Ltd v Daw Saw Hla* (1953) BLR 350 (HC).

³⁹ Or with what English lawyers at the time argued that the English common law should be.

⁴⁰ The Privy Council appears to have held that the doctrine of privity is part of the law of India (*Janna Das v Ram Avtar* (1911) 30 Ind App 7) and of Malaysia (*Kepong Prospecting Ltd v Schmidt* [1968] AC 810). These decisions have no formal status in Myanmar.

⁴¹ *Burma (Government Security) Insurance Co Ltd v Daw Saw Hla* (1953) BLR 350 (HC), 356.

⁴² Though C may have been the person who provided consideration: Contract Act, s 2(d).

⁴³ It is not clear that C may. He is not within the class of persons listed in Specific Relief Act s 23, but he is not listed among those in s 24 in whose favour a decree may not be ordered.

there will be no need to assess compensation, and some at least of these problems will not arise.

There are different problems if B sues A when A fails to perform. B, after all, accepted and provided consideration for A's promise. That might suggest that B should be entitled to sue A if A does not perform. However, if A had performed the promise exactly as promised to B, B would not have received anything: this may mean that A's failure to perform causes B no loss, so that B is not entitled to any compensation. Issues of this kind have proved to be tricky in many systems, and legislation has been required to provide answers to some of them.

5.10 Altering the parties to the contractual obligation

It is necessary to deal with two types of case.

(a) Novation

If A makes a contract with B by which B is bound to A, it is not open to B to 'transfer the obligation' which bound A to another, say to C. No time need be spent on the justification: the private relationship, the obligation, the tie of law, created by A and B binds them both and belongs to them both, and for one to say that that party has decided not to perform but to pass the burden of performance to another is to break his contract with the other, whether or not the proposed new party is willing to step into B's shoes. This is not to deny that there may be situations where A agrees that B does not need to perform personally but can perform through someone else.⁴⁴

But it is equally an obvious aspect of freedom of contract that if the promisor and promisee (A and B) agree, and if a person (C) who was not a party agrees to it, C may become a party to the contract by replacing one of the existing parties. The replacement of one contract by the same (or a very similar) contract between one of the parties and a new party is referred to as 'novation'. In practice, novation is very common where companies are amalgamated or there is a change in a partnership. According to Section 62 of the Act:

62. Effect of novation, rescission and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Although Section 62 is directly concerned with non-performance, its effect is to recognise the freedom of the original parties, acting by agreement, to substitute one party for another (as well as one obligation for another). As the Illustrations show, if B owes money to A, and A agrees to accept C as debtor, in place of B, and C also agrees to that, the contract between A and B is at an end and a contract between A and C springs up in its place. It all depends on mutual agreement:⁴⁵ on A agreeing

⁴⁴ This is dealt with in Section 40 of the Contract Act and is discussed in the next chapter.

⁴⁵ *ASPSKR Karuppan Chettyar v A Chokkalingam Chettyar* (1949) BLR 46 (SC) at 51; *Haji Daw Thein v Haji Abdul Samad* (1971) BLR 160 (CC).

to accept C as a substitute for B, and on C agreeing to assume the liability. This is not therefore a case in which B has transferred a liability to another, but a case in which the parties to the contract, acting with agreement among themselves and with the consent of any other person who is to be brought within the contractual obligation, agree to substitute one party for another.⁴⁶

(b) The assignment of rights

In contrast to the position with obligations under a contract, a contracting party may, without the consent of the other party, assign (or transfer⁴⁷) to another rights created by the contract.⁴⁸ It will, of course, be otherwise if the contract forbids assignment or if it is one governed by legislation which places limits on, or removes, the freedom to assign the rights created by the contract.⁴⁹ In principle there is less of an objection to the assignment (transfer) of the rights or benefit of a contract, as opposed to the obligations, for this does not obviously detrimentally affect the other party to the contract.

The law on assignment in some common law jurisdictions has become very complicated indeed. The reason for this is that much of commerce in developed economies depends on the ability to assign the benefit of contracts (including, remarkably, the benefits of contracts which have not yet been made). One way of raising finance to fund the expansion of my business is to assign to a person prepared to lend me money the rights to payment under contracts which I will make with my customers in the months or years to come. That ability to assign (or transfer) contractual rights, or 'receivables' as these are sometimes called, is a brilliant invention of the common law which allows a trader to gain access to finance in order to expand a business. It can also go horribly wrong when one of the parties involved does this with excessive enthusiasm and ends up going bankrupt.

In some cases, even though the contract does not expressly forbid assignment, the nature of the contract will make it obvious that this is unacceptable. For example, if I have a contract of employment with a bank, and the bank merges with another and proposes to assign (or transfer) its rights against me as employer to the new bank, a court would be likely to conclude that it was free to do so. By contrast, if I am

⁴⁶ But the alteration of one of the terms of a contract is not seen as a novation: *LAG Mohamed & Sons v The East Asiatic Co Ltd* (1958) BLR 524 (HC).

⁴⁷ We tend to use the word 'transfer' for tangible property, and 'assign' for intangible property such as rights. But it is not clear that the Burmese language draws that distinction, and for present purposes, the terms 'assign' and 'transfer' can be considered to be interchangeable.

⁴⁸ The mechanism for effecting, and the consequence in law of having effected, the transfer or assignment is set out in the Transfer of Property Act 1882, ss 130-137, which is where the detail of the law on assignment is to be found. The Transfer of Property Act, insofar as it relates to contracts, is taken to be part of the Contract Act: see Transfer of Property Act, s 4. Sections 130-137 do not apply (see s 137) to stocks, shares, or negotiable instruments, which are governed by other statutes. The Act does deal with the making and effect of assignments; it does not deal with the question whether a particular proposed assignment is permitted to be made.

⁴⁹ For example, *U Chit Tin v Daw Ma Ma Gyi* (1964) BLR 118 (CC) (s 15 Union Insurance Board Act as amended). It is possible that some forms of assignment may also be unlawful as being opposed to public policy under Section 23 (for example, because champertous although it is not clear what the law is on champerty/maintenance in Myanmar).

retained as consultant or adviser (or servant) to X, and X proposes to assign (transfer) the benefit of its contract with me to Y, who is a person of low reputation, it would certainly be inconsistent with my contract with X for X to purport to do this. The reason is that some contracts are inherently personal in nature, and the personal qualities of the parties are important, not accidental. The underlying principle is that the assignment must not be detrimental to the party who would now be required to perform for the assignee rather than the assignor.

6

Performance and Release from Performance

The principles of, and the detailed rules concerning, the performance of the promises contained in a contract.

Having established the contents, and the proper meaning of the contents, of the contract, the next enquiry is as to what is permitted or required for the contract to be performed. We will be concerned with what must be done by way of performance of the promises in the contract, who must perform, and the conditions which regulate the detail of that performance. The Contract Act contains a surprisingly large number of provisions setting out the details – or, more precisely, the default rules – which determine what is required to perform the promises of the contract, and the sequencing of the performance; and although these are often straightforward, it is necessary to discuss them. For performance is the very point of a contract: a contract which is not performed is a rather pointless thing. We must therefore understand the manner in which the Contract Act regulates performance.

When we examine performance, it is inevitable that we will also consider when performance is not required: they are often two sides of the same coin. Accordingly, in this chapter we will observe when or why a party may not be required to perform his obligation. As it is so large, and important, a topic, we consider breach of contract separately. No doubt it is sometimes true that when there has been a breach of contract, a party does not have to perform his outstanding promises. But the treatment of breach, and its consequences, is to be found in Chapters 7, 8, and 9.

We can consider the law relating to performance of promises under ten points, which are as follows:

1. The general obligation to perform promises;
2. The general obligation to allow and accept performance;
3. The person who must perform;
4. Performance in the case of joint promisors and joint promisees;
5. The time, manner, and place for performance;
6. Performance in respect of reciprocal promises;
7. Performance under contingent contracts;
8. Performance of payment obligations, and the appropriation of payments to obligations;

9. Release from performance when contract rescinded or altered by agreement;
10. Release from performance when obligation dispensed with or remitted by promisee.

6.1 The general obligation to perform promises

The point of departure for the law on performance of promises is to ascertain precisely what the promisor promised to do: insofar as this requires the interpretation of the terms of the contract it will be done by reference to the rules examined in the previous chapter. Once this has been done, we look to Section 37 of the Act, which sets out the basic duty, as follows:

37. Obligations of parties to contracts. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

(a) Performance in general

The first sentence of Section 37 calls for no particular comment as it is obvious that contractual promises must in principle be performed according to their terms. The obligation to perform subsists until it is discharged by performance. The obligation to perform is absolute: the duty on the promisor is to do precisely what that party promised to do.¹ Exceptions to the strictness of the rule are very few, though the making of payment to one of two joint promisees is effective to discharge the debt owed to the promisees jointly,² perhaps because it does not appear reasonable that it should be the task of the party, willing and able to pay, to assemble and obtain the agreement of (perhaps quarrelling) joint promisees. In that narrow case, performance may be effective in circumstances which do not precisely correspond to the terms of the contract. Otherwise the rule is a strict one.

Of course, performance may not actually be achievable if the party who is to receive that performance refuses to cooperate by playing its part. In those circumstances, the obligation is to offer to perform, or, in the language of the cases, to 'tender' performance. For example, a company selling rice may issue a milling notice to the buying company, stating the date and place at which the rice will be milled and made available for delivery: the issue of the milling notice is the offer to perform, or the tender of performance, to the buyer. The buyer is then required to perform its obligation to provide gunny sacks for taking delivery of the rice, and so on; the

¹ *KK Janoo & Co v Joseph Heap & Sons* AIR 1918 LB 97 (contract to deliver rice to buyer's mill not performed by informing the buyer of its location at another mill and undertaking to deliver it after the plaintiff had been to inspect it).

² *Maung Nyan Mo v Ma Po* AIR 1918 UB 19.

question of what happens if it does not do so is considered under the following point.

Unless the promise is qualified in some way, it is not sufficient for the promisor to try to achieve what it promised to achieve, or to have used its best efforts to do what it promised to do. If I am a taxi-driver and promise to drive you to the airport to get there at 11.00 for a flight at noon, I cannot claim to have performed my promise if I tried very hard to get you to the airport but, because of the traffic, was unable to do it and only got you to the airport after noon. Sometimes, by contrast, the promise which is made requires the promisor to use best efforts to achieve a result, rather than actually to succeed in achieving that result, even if the express terms appear to make an absolute promise. So, for example, if a promisor promises to teach my daughter to drive, or my son to play the violin, he promises to use his skills and best endeavours to bring about this result: if he does that, he will have performed his promise, even if my daughter still cannot drive or my son still makes a terrible ear-splitting mess of the violin.

(b) Performance of 'entire' obligations

It may be necessary to assess the promise to determine whether it is divisible, or entire and indivisible. Though it is a question of construction, which really should have been taken within the scope of the previous chapter, the law on entire agreements is of particular significance to the law of performance. If, on its true interpretation, the promisor's promise to pay is conditional on complete and entire performance by the other, the obligation to pay does not arise for performance unless and until the entire obligation of the other has been performed.

For example, if I agree to pay you on a monthly basis but you cease to work for me halfway through a month, I have no (contractual) obligation to pay for work done during that month.³ If I agree to buy a consignment of 400 drums of oil but you only deliver 360 tons I am entitled to reject the delivery and pay you nothing.⁴ If I agree to pay you a sum of money if and when you build me a house, but you fail to complete the building, I am not required to pay anything, as the condition on which my promise to pay was conditional has not been satisfied. Unless there is something in the contract to indicate that it was not an 'entire' agreement (such as where there is a provision for stage payments), the entire promise must be entirely performed: there is no such thing as 'part performance' of an entire obligation. Such a term is not a penal one, even if it may operate in a manner which seems unfair in the way it may allow a party to avoid paying anything at all even though that party may have had much of the service, for it is neither a provision for the payment of money on breach, nor penal, but is rather a normal and well-understood incident of an entire contract.⁵

³ *Etbari v Bellamy* AIR 1938 Ran 207; see also *Kunbha Haji Raghaw v Motichand Makanji Shah* AIR 1917 LB 31.

⁴ *Messrs Seng Huat & Co v The United Chemical Works* (1950) BLR 417 (HC) (where the contract was held to be an entire one).

⁵ See further, *Dwarika v Bagawati* AIR 1939 Ran 413; *DK Parekh v The Burma Sugar Co Ltd* (1948) BLR 257 (HC), and the cases discussed below, Chapter 8.9.

It is conceivable that there may be a claim outside the contract⁶ for, for example, work done on a *quantum meruit* basis but this will not be granted where this would too sharply contradict the terms on which the contracting parties agreed.

The entire obligation rule can seem harsh; indeed, in some of its early applications in English law to the wages of seamen who were killed after many arduous months of service but before completion of the voyage (nothing was payable because the obligation was entire) its effects were pretty appalling.⁷ But if it reflects the true nature of the contract, which the parties actually and freely made, it would be strange for the court to make a significant alteration to it. It also encourages the contractor to finish the work: from the client's point of view, a builder who has done some of the work and who has collected 85% of the payment is a real menace, for he may have little economic incentive to come back to finish the job for what may be a small unpaid fraction of the contract price, and that can make life very difficult for the client. On the other hand, the entire obligation rule could produce intolerable results in the hands of an unscrupulous client. If such a person could argue that she had no obligation to pay, by pointing to a minor blemish or shortcoming in the overall performance, the result may be seen to be simply unacceptable.

It may be, therefore, that Myanmar law will soften the effect of interpreting an obligation as being entire by accepting that, as a matter of interpretation, 'substantial performance' is sufficient to count as performance, subject to paying compensation for minor defects. Alternatively, this may be one of the situations where, as there is no specific rule on 'substantial performance' in the Contract Act, the courts in Myanmar may conclude – having recourse to the principle of 'justice, equity, and good conscience' – that if there really has been 'substantial performance' of an entire obligation, and that perceived minor shortcoming could be dealt with by a modest sum by way of compensation, then this will be sufficient to be considered as the performance of an entire obligation.

(c) Performance after death of promisor

As the second paragraph of Section 37 makes clear, the promisor's promise is binding, in principle at least, on his estate.⁸ It is obviously not binding on his successor in his personal capacity: the contracts of fathers cannot be enforced against sons and daughters or the assets of sons and daughters, but if the estate can fulfil the promise made by the deceased before he died, it must do so. If therefore the deceased owed a contractual obligation of payment at the date of his death, his estate is required to pay; and if a debt was owed to the deceased person prior to his death, it is owed to (and may be enforced by) his estate after his death.

Of course, if the obligation is a personal one, the rule in the second paragraph of Section 37 will not apply. As Illustration (b) to Section 37 makes plain, if the

⁶ See chapter 10 below.

⁷ The possibility that not only will the worker receive none of the sum agreed to be paid, but will also be liable to pay compensation for breach is even harder to accept, but see *Kunbha Haji Raghaw v Motichand Makanji Shah* AIR 1917 LB 31.

⁸ *U Dun Htaw v Maung Aw* AIR 1929 Ran 274, (1929) ILR 7 Ran 423. See Illustration (a) to Section 37.

deceased was an artist who had promised to paint a portrait, the obligation to paint the picture cannot be enforced against the legal representative of the estate. Neither can the representative insist that he will paint the portrait and collect the fee for the benefit of the estate.⁹

6.2 The general obligation to allow and accept performance

If it is the duty of the promisor to perform, it is the duty of the promisee to allow (and not prevent) performance, and to accept performance. If the promisee fails to do either of these, the promisor is excused from the duty to perform.

(a) Promisee's duty to allow promisor to perform

If it were not already obvious, the existence, nature, and extent of the promisee's duty to allow performance is demonstrated by Section 67, which makes provision for the situation in which the promisee obstructs performance. It provides as follows:

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

For example, if I engage you to repair the roof of my house, but when you turn up to do the work I have left the compound locked up so that you cannot gain access, or I have gone away without giving the security guard instructions to allow you in, with the consequence the roof is not repaired and water pours into the house when the rains come, I cannot sue you for compensation for the loss which would not have occurred if you had carried out the repair in accordance with the contract. Your non-performance is justified because it was brought about by my fault, not yours. No doubt a question of ascertaining the terms of the contract, and/or their interpretation, will arise if I complain that it was your duty to notify me of the date on which the repair would be carried out, so that I could make proper arrangements for access, but the general principle for which Section 67 stands is uncontroversial and practical.

(b) Promisee's duty to accept performance when tendered

A similar analysis applies in relation to the duty of the promisee to accept performance. If a party offers to perform his promise, but the promisee does not accept the offer, the promisor has no obligation to perform, but he retains his rights under the contract, for the responsibility for the non-performance lies with the promisee.¹⁰ Naturally, the law requires the offer of performance to be a proper one, but if it is,

⁹ See generally *U Dun Htaw v Maung Aw* AIR 1929 Ran 274, (1929) ILR 7 Ran 423.

¹⁰ *KK Janoo & Co v Joseph Heap & Sons* AIR 1918 LB 97.

the promisee must accept it; Section 38 deals with the precise nature of what must be offered by way of performance, and with the consequence of the promisee not accepting it:

38. Effect of refusal to accept offer of performance. Where a promisor had made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he lose his rights under the contract.

Every such offer must fulfil the following conditions:

- (1) it must be unconditional;
- (2) it must be made at a proper time and place, and under such circumstances, that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

The fact that A has offered performance to B, in strict conformity with the terms of the promise, means that A has performed his obligation to B to offer performance, and A is not liable for any loss or damage to B which may result from the fact that A has not performed the obligation in question. It does not mean that A has been released from the obligation to perform unless the case falls within Section 39 and the refusal by B to accept performance is taken by A as a refusal by B to perform which allows A to put an end to the contract.¹¹ After all, if A tenders payment for goods to be sold by B, and B refuses to accept payment, it would be a very odd result if A no longer had to pay but B remained liable to deliver the goods. This is not the law.

The Illustration given to Section 38 explains that the offer may take the form of conduct. If the promisor had contracted to deliver 100 bales of cotton to the promisee's warehouse on a given day,¹² the seller, seeking the protection of this provision, must bring the cotton to the warehouse on the day in question and allow the promisee a reasonable opportunity to examine the bales for quality and number. This is an offer by conduct or by performance.

The Illustration gives the example of delivery of bales of cotton. In the case of sales of rice, the issue of a milling notice serves the same purpose: it is a statement to the buyer of the seller's readiness to perform; a tender of performance.¹³ In this context

¹¹ On which, see the following Chapter.

¹² *KK Janoo & Co v Joseph Heap & Sons* AIR 1918 LB 97 (contract to deliver rice to buyer's mill not performed by informing the buyer of its location at another mill and undertaking to deliver it after the plaintiff had been to inspect it). The judgment is also notable for its emphasis on the use of the Illustrations to the provisions of the Contract Act as authoritative guidance in the interpretation of the Act, following in this regard the decision of the Privy Council in *Mahomed Syedol Ariffin v Yeoh Ooi Gark* (1916) 48 Ind App 256, AIR 1916 PC 242.

¹³ *Mohamed Valli Patel v The East Asiatic Co Ltd* AIR 1936 Ran 319, (1936) ILR 14 Ran 347.

Section 38 describes and regulates what the common law elsewhere refers to as 'tender'. The effect of a tender of performance which is not accepted is not that the promisor is treated as having performed his obligation, but he is discharged from performing it. The failure of the promisee to accept a conforming tender is a failure by the promisee to perform his promise (whether express or implied is irrelevant), which will allow the promisor, if he wishes, to put an end to the contract in accordance with Section 39, which we discuss in the following chapter. So if the seller refuses to accept tender of payment, the offer of payment by the buyer, the buyer is not liable for any adverse consequence to the seller, but the refusal of his offer to pay does not by itself discharge him from the obligation to pay. However, the fact that he tendered payment, and remained ready and willing to pay, will give him a good defence if he is sued on the debt, and will mean that he has no obligation to pay interest on account of late payment.

The tender must be unconditional. Taking the example of the buyer's tender of payment, it follows that if a buyer offers to pay, or tenders, a certain sum and requires the seller to accept or confirm that this is the whole of the sum due, the offer or tender is not unconditional, and it will not fall within Section 38. If the seller refuses to accept the sum offered on the basis that it is less than the contract required the promisor to pay, he cannot be prevented from suing for the whole sum and seeking interest on any late payment. It follows, of course, that the offer to pay an unliquidated or unquantified sum is not an offer for the purpose of Section 38.

A seller is not required, unless the contract so provides, to accept an offer of payment in anything other than cash: this is why money in the form of bank notes¹⁴ is often referred to as legal tender. If the seller accepts payment by something other than cash – a cheque or other negotiable instrument, for example – it is a matter of construction to determine whether this was accepted in absolute satisfaction of the debt, or in conditional (that is, upon realisation of the instrument) satisfaction of the debt.

The result is that if a promisor offers to perform, unconditionally and in accordance with the terms of the contract, the promisee is duty bound to accept performance. If the promisee does not, the promisor is not thereupon freed from the obligation to perform, but he cannot be blamed or accused, or sued, for failure to perform that obligation.

6.3 The person who must perform

One would expect the law to provide that the promisor should perform her promises, but this principle is subject to considerable qualification. According to Section 40:

40. Person by whom promise is to be performed. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it.

¹⁴ And, in countries which use them, also coins.

The starting point is that the promisor must do what she promised to do. If she promised to do it herself, she must do it herself. If I pay a person to repair my computer, I may have chosen him for the job because I have heard from others that he has the expertise I am looking for; if he does not do the repair himself, but arranges for the work to be done by someone else, I may argue that this is not performance of the promise. But if on a true construction of the contract the repairer simply promised to get the computer repaired, but not necessarily by his own hand, there may be performance, and no breach, if the work is actually done by another person. It will all depend on the circumstances, and on the wording of the contract. Sometimes the promisor promises to do by her own hand; sometimes she promises 'to do or cause to be done', and in this case it is not the intention of the parties, as this is shown by the terms of the contract, that the work must be done by the promisor herself.

If I make a contract with an artist for my portrait to be painted, it would be most surprising if the contract were interpreted to mean that either the artist or anyone designated by her for the job could paint the portrait.¹⁵ On the other hand, if A promises to pay B a sum of money, A may pay the money personally or arrange for another to pay it: the payment of money is exactly the same if done by A or by another on A's behalf. Probably similar is the case in which I arrange with a person for him to collect me from the airport and drive me to my hotel, it is unlikely that the contract which we have made requires the service of driving me to be performed by that individual personally. If, therefore, it is done by his business partner, or his employee, or even by a sub-contractor, it is likely that this will amount to performance of the promise (and if it should be held that it did not, one should go on to consider Section 41 before concluding that there has been a breach of contract). It is, as Section 40 indicates, all a matter of ascertaining the apparent intention of the contracting parties.

If I engage a lawyer to provide legal services, but he arranges¹⁶ for the work to be done by a junior lawyer in his office, can it be said that the promise has been performed? It is not easy to say: I may have chosen this lawyer because of his experience, but the provision of legal services is not, perhaps, the kind of contract in which there was an intention that the promisor, and only the promisor, provide the service: it is a little different from the case of the artist. If I book a flight with an airline renowned for safety and reliability, but when I get to the airport I learn that the flight will be operated by 'code-share partner airline', in which I have no confidence at all, has the airline performed its promise? The answer may appear to be that it has not; but to deal with this possibility, the airline, and perhaps also the lawyer, will make their contract with me on written terms which specifically allow the delegation of responsibility for carriage to another, and in that case there can be no legal objection. Otherwise Section 40 can require us to answer some rather tricky questions.

¹⁵ Illustration (b) to Section 40.

¹⁶ In Myanmar usage, it may be said that he 'assigns' the duty to a subordinate. The use of the expression 'to assign', in this context, describes the ordering of another person to discharge a function. It does not refer to the 'assignment' in the sense of the transfer of rights which we examined at the end of the previous chapter.

If a contract did, on its true construction, provide for performance by a specific individual, but performance is offered by another, and is accepted by the promisee, that is sufficient to discharge the obligation. The rule is in Section 41:

41. Effect of accepting performance from third person. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

This means that the promisor, on being sued by the promisee, may plead in his defence that the promisee has accepted satisfaction (the promise of satisfaction, but which has not yet been delivered is not sufficient) from another. If, for example, a person to whom my son owes \$10,000, which he may well be wholly unable to pay, accepts \$8,000 from me in satisfaction of the debt of my son, he is prevented by Section 41 from taking my money and then going back to sue my son for the \$2,000 difference.¹⁷

6.4 Performance in cases involving joint promisors or joint promisees

Where the parties to the promise – whether on the giving or on the receiving side – are more than one in number, the promisors or promisees, as the case may be, are said to be joint. It is necessary to examine the conditions of liability of joint promisors, and then the position of joint promisees.¹⁸

(a) Joint promisors and the duty to perform

Sections 42 to 44 deal with the case in which the promise is made by more than one person, these persons acting jointly. Given the relatively small importance of joint promises in the law generally, it is sufficient to state the provisions of the Act, and then offer only a few comments.

42. Devolution of joint liabilities. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. Any one of joint promisors may be compelled to perform. When two or more persons make a joint promise, the promise may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

¹⁷ Either this is the effect of Section 41, or it is the effect of a combination of Sections 41 and 63: Section 63 is dealt with in detail below, Chapter 6.10.

¹⁸ However, insofar as the law of partnership has its own rules for the performance of promises which are seen as joint, it will be the Partnership Act 1932, and not the Contract Act, which provides the answers to the many questions which may arise.

Each promisor may compel contribution. Each two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.— Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

44. Effect of release of one joint promisor. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors.

So far as liability to perform the promise is concerned, then unless the contract makes it clear that the intentions of the parties were otherwise, where a promise is made by two or more promisors, they make it, and are liable to perform it, jointly and severally, or (which is to say the same thing) both collectively and individually. This situation continues even after the death of one of them: the legal representatives of the deceased promisor stand in his shoes and remain as liable as the deceased had been when he was alive. Any promisor can be called up by the promisee to perform in full: he is not restricted to performing 'his share', as the nature of a joint promise is that there are no shares: each joint promisor is liable in law to perform the promise, in full. To make the same point another way, one promisor is not entitled to complain if the promisee elects to sue him alone.¹⁹ A landlord who has leased premises to four individuals as joint tenants may therefore demand payment of the full rent from any one or more of them: even if three abscond, or are unable to pay, the fourth remains fully liable.²⁰

Of course, a joint promisor who has performed the promise in its entirety, or who has been successfully sued by the promisee, should be entitled to seek a contribution from those other joint promisors whose liability will have been discharged by (his) performance, but this is a matter which rests between the promisors: it is not the concern of the promisee. Such a claim for contribution from other joint promisors under the second paragraph of Section 43 depends on the plaintiff-promisee having first (already) paid or performed for the promisee; it does not depend on his having consulted or obtained the agreement of the other before he performs for the promisee.

(b) The right to receive performance and joint promisees

The position or rights of promisees who are two or more in number is dealt with in Section 45:

¹⁹ Illustration (a) to Section 43.

²⁰ As, of course, do the other three: absconding or lack of resource cannot discharge the obligation to pay.

45. Devolution of joint rights. Where a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.

Here, by contrast with the position of the promisors, the advantage of the promise is held only by the promisees collectively: it is not held by any of them, and therefore cannot be claimed by any one of them, severally or individually. They are not entitled, without the agreement of the promisor, to sever the single joint promise and convert it into separate promises. If, therefore, proceedings need to be brought to enforce the promise, all the promisees must join the action as plaintiffs. If any of them refuses to cooperate, he will need to be joined to the proceedings as a defendant.²¹ In the particular case of partners, a suit can be brought by all of them collectively, but for convenience it is possible for any or all of them to sue in the name of the firm in which they carry on business.²² However, a payment to one of two joint promisees is effective to discharge the debt owed to the promises jointly,²³ not least because it does not appear reasonable that the party willing and able to pay should be required to assemble and obtain the agreement of all the joint promisees.

6.5 The time, manner, and place for the performance of promises

The parties may obviously stipulate in their contract for the time, manner, and place of performance of the promises made. In default of such specification by the parties, the general answers are given by the Act.

(a) Time for performance of promises

The general rule about the time for performance of promises is given by Section 46 of the Act, which states as follows:

46. Time for performance of promise where no application is made and no time is specified. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation- The question ‘what is a reasonable time’ is, in each case, a question of fact.

47. Time for performance of promise where time is specified and no application is made. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it

²¹ However, where one of two joint promisees has died, the survivor can sue by virtue of the principle of survivorship; there is no need to plead succession to the estate of the deceased promisee: *Daw Ywet v Ko Tha Htut* (1929) ILR 7 Ran 806.

²² Civil Procedure Code 1909, First Schedule, Order 30 r 1.

²³ *Maung Nyan Mo v Ma Po* AIR 1918 UB 19.

at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

48. Application for performance on certain day to be at proper time and place. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation- The question 'what is a proper time and place' is, in each particular case, a question of fact.

The use of the term 'engagement' in Section 46 is a distraction; it means, and should have read, 'promise'.²⁴ The very generality of Section 46 means that no guidance can be given as to the meaning of 'a reasonable time', except that it will require reasonable diligence and efficiency, rather than superhuman efforts. In Section 47, 'day' means the period of 24 hours from one midnight to another (and 'the usual hours of business' those hours falling within the day thus defined²⁵), as distinct from a period of 24 hours from a different defined point, though if the parties make different provision in their contract, this will override the general answer.²⁶

For example, if under the terms of a contract for the sale of rice, the seller is entitled to determine the date (within a defined period) on which it will mill the rice, and it issues a milling notice to the buyer accordingly, it then becomes the duty of the miller to be ready, willing and able to deliver the rice on that date, and it is the duty of the buyer to take delivery on that date.²⁷

If no time is stipulated for performance, these Sections insert into, or add onto, the contract a term for performance within a reasonable time; and if the promise is not performed within this period, there is a breach of contract and compensation will in principle be recoverable. Whether the failure to perform (in this sense) in time will allow the promisee to treat the breach as a basis for bringing the contract to an end will depend on whether time was of the essence of the contract, which is examined below in relation to Section 55 of the Act.

(b) Manner of performance of promises

In accordance with principle, the parties are at liberty to stipulate in their contract how performance is to be effected, but if (or to the extent that) they do not, Section 50 applies. It states as follows:

²⁴ It is believed to come from an earlier draft of the proposed Contract Act, which was amended (but not as completely as it should have been) before the final enacted version.

²⁵ Illustration to Section 47.

²⁶ For illustration, see *Steel Bros & Co Ltd v Tokersee Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372 (when the seller issues a notice requiring the buyer to come and take delivery (in this case, a milling notice of the kind commonly used in the trade), that becomes the date in which delivery is due, and if the seller does not deliver on that date he is then in default; *G Kyi Maung v Morrison & Co* AIR 1933 Ran 399, (1933) ILR 11 Ran 506.

²⁷ *Steel Bros & Co Ltd v Tokersee Mooljee* AIR 1932 Ran 162, (1932) ILR 10 Ran 372 (refusal of seller to deliver on the specified date); *G Kyi Maung v Morrison & Co* AIR 1933 Ran 399, (1933) ILR 11 Ran 506 (refusal of buyer to accept milling notice and take delivery on the specified date).

50. Performance in manner or at time prescribed or sanctioned by promisee. The performance of any promise may be made in any manner, or at any time, which the promisee prescribes or sanctions.

If the contract prescribes the manner of performance, this is how the promise must be performed. It is not open to the promisor to 'improve' the performance by some means which may be considered to be preferable: if the contract provides for payment in cash, it is not open to the promisor to pay by the electronic transfer of funds, even if this is said to be safer or more convenient, unless the promisee should agree that the performance obligation be altered in this way: if it does that, it 'prescribes or sanctions' the variation, and compliance with that variation will discharge the promisor: performance by a means sanctioned by the promisee will be good performance. If the promisee agrees that the payer should make payment by arranging a transfer of funds to the promisee's bank account, and soon after this is done the bank fails, the promise of payment will have been performed, even though the payee does not receive the money.²⁸ If the payee asks the payer to post him a cheque for the sum due, the debt is discharged as soon as the letter is posted, because the payer has done what the payee asked him to do.²⁹

(c) Place for performance of promises

As with the time and manner of performance, the place at which performance is required is, in the first instance, a matter for the parties to specify.³⁰ In default of this, Sections 48 and 49 deal with the issue. Section 48 was set out above; Section 49 provides as follows:

49. Place for performance of promise where no application to be made and no place fixed for performance. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

If the place for performance is not fixed expressly, it may be ascertained from the apparent intention of the parties and the circumstances of the case. So far as concerns the payment of money, the general rule of the common law is that, unless the contract makes different provision, the payment of money is due at the creditor's place of business because it is the duty of the debtor to seek out his or her creditor, and not vice versa. This rule has been held to reflect the law of Myanmar.³¹

6.6 Performance in respect of reciprocal promises

The performance of reciprocal promises is dealt with in detail by the Act.

²⁸ Illustration (a) to Section 50.

²⁹ Illustration (d) to Section 50.

³⁰ *KK Janoo & Co v Joseph Heap & Sons* AIR 1918 LB 97 (contract to deliver rice to buyer's mill not performed by informing the buyer of its location at another mill and undertaking to deliver it after the plaintiff had been to inspect it).

³¹ *Soniram Jeetmul v RD Tata & Co Ltd* AIR 1927 PC 156. The practical significance of the issue was that if payment was required to be made in Rangoon, the court had jurisdiction by reason of Section 20(c) of the Civil Procedure Code; if not, not. See also *KSPLA Annamalai Chettyar v Daw Hnin U* AIR 1936 Ran 251.

(a) Performance of reciprocal promises

If a contract comprises reciprocal promises, Section 51 sets out the conditions in which a promisor is required to perform:

51. Promisor not bound to perform unless reciprocal promisee ready and willing to perform. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

It seems obvious that if on its true construction a contract provides for A to perform if B also performs, and B is not willing to perform, then A is not obliged to perform because B is not willing to perform.³² If A is to deliver goods to B to be paid on delivery, A is required to deliver only if B is ready and willing to pay; and B is required to pay only if A is ready and willing to deliver the goods.³³ As with the case of offers to perform which are not accepted, the effect of B's unreadiness or unwillingness is not to extinguish the duty to perform, but to impose a delay upon the date or time of its performance.

When promises are reciprocal, therefore, each party has the option to perform her side of the contract, but she has no duty to do so – the other party has no right to compel her to do so – without her performing that which she had agreed to do.

Where the contract does not provide for simultaneous, but for sequential, performance of the promises, Section 52 provides that performance shall be in that order:

52. Order of performance of reciprocal promises. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where that order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

(b) Non-performance in the case of reciprocal promises

The final point is made by Section 54, which deals with the case in which the reciprocal promise which should be performed first has not been performed.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

The meaning and effect of Section 54 is so obvious that there is nothing which needs to be said about it by way of explanation.

³² *AKACTAL Chettyar v AKRMMK Firm* (1938) RLR 660, AIR 1939 Ran 84.

³³ *Jagannath Sagarmal v JJ Aaron & Co* AIR 1940 Ran 284; cf Sale of Goods Act, Section 32.

6.7 Performance under contingent contracts

Contingent contracts, which occupy a whole chapter of the Act by themselves, appear to have had a significance in Myanmar law which does not appear to be easy to understand today. In chapter 3, we have already touched on contingent agreements that are void because impossible from the outset, or contingent contracts that become void because of subsequent impossibility. Here our focus is on the performance that is required under a contingent contract.

A contingent contract is defined by Section 31:

31. 'Contingent contract' defined. A 'contingent contract' is a contract to do or not do something, if some event, collateral to such contract, does or does not happen.

An insurance contract, for example, is a contingent contract, for the liability of the insurer to pay out depends on the contingency specified in the contract – the fire, the injury, the death, as the case may be.³⁴ The essence of a contingent contract is that the duty to perform does not arise until the contingency occurs.

The rules governing performance explain the effect on the duty to perform of the contingency arising (Section 32), or of a negative contingency being satisfied by the event becoming impossible (Section 33), or of the contingency becoming impossible (Section 34), or of a contingency limited by time not arising by the end of that period (Section 35), or of a contingency being impossible from the beginning (Section 36). The Sections provide as follows:

32. Enforcement of contracts contingent on an event happening. Contingent contracts to do or not do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

33. Enforcement of contracts contingent on an event not happening. Contingent contracts to do or not do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

34. When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under future contingencies.

35. When contracts become void which are contingent on happening of specified event within fixed time. Contingent contracts to do or not do anything, if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time. Contingent contracts to do or not do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the

³⁴ See Illustration to Section 31; for confirmation, see the Indian decision in *Commissioner of Excess Profits Tax v Ruby General Insurance Co Ltd* AIR 1957 SC 669.

time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

36. An agreement contingent on impossible events void. Contingent agreements to do or not do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

These sections are unlikely to cause difficulty in practice and are, in any event, self-explanatory. We can therefore move on from contingent contracts without further elaboration.

6.8 Performance of payment obligations, and the appropriation of payments to obligations

It sometimes happens that a debtor owes several debts to the same person. A shop-keeper who obtains her supplies from one supplier, with whom she may make several contracts in a week, or a company which obtains its office supplies from a single supplier, but places orders every month, may, if it does not make payment immediately, have many, many unpaid invoices. The customer may then pay over a sum of money to the supplier, indicating carefully which of the particular supply contracts it is made for. But the customer may do something different, paying a sum of money to the supplier, on account of overall indebtedness but not giving any indication (nor any thought to) which of the many debts the sum paid should be allocated to. This issue is addressed by Sections 59 to 61, which considers the issue of the appropriation of payments:

59. Application of payment where debt to be discharged is indicated. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

60. Application of payment where debt to be discharged is not indicated. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him by the debtor, whether its recovery is or is not barred by the law in force for the time being as to limitation of suits.

61. Application of payment where neither party appropriates. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

The debtor, when making a payment, is entitled³⁵ to inform the creditor that the payment is made in respect of a particular debt, contract, sale, supply or service, and

³⁵ *TD Foster v RMAL Chetty Firm* AIR 1925 Ran 4, (1924) ILR 2 Ran 204 (it is an absolute right of the debtor, whether the creditor likes it or not).

the creditor, if accepting the payment, is required to apply it on that basis. Of course, if there is an express agreement between the parties – say there is an umbrella, or framework, agreement under which the individual contracts are made – which provides for the appropriation of payments, this will be given effect in preference to the default rules of the statute, principally because this is in fact foreshadowed by Sections 59 and 60. It may be that the appropriation may be implied, though this is obviously riskier for the payer. However, as Illustration (a) to Section 59 explains, if A owes several debts to B, but one of them is for a particular sum which falls due on June 1st, and A sends that precise sum to B on June 1st, it will be possible to imply that the payment was appropriated by A to the debt due on that date. But it would be much better for A to have made that expressly clear when making the payment.

If the paying debtor does not exercise the power to appropriate, the right to do so passes to the creditor who may exercise it entirely in her own interests.³⁶ This may be disastrous for the debtor. In particular, the creditor may apply the payment to a debt which is so old that a suit to enforce it would be barred by the Limitation Act 1909. As Section 4 of that Act merely provides that after a period of years ‘every suit instituted... shall be dismissed’, the passing of time does not extinguish the underlying right or debt; it merely prevents access to the courts for its enforcement. So for example, the Act provides³⁷ that a suit for the price of goods sold and delivered where no fixed credit is agreed upon must be brought within three years of the date of delivery. But if four years have now passed since the goods were supplied, so that the debt could no longer be sued on in court, the creditor may nevertheless appropriate a payment to that old debt. It follows that the debtor acts unwisely if she makes a payment but fails to exercise her right or privilege to appropriate it to a particular debt. Of course, the creditor may not appropriate it to an unlawful debt.

6.9 Release from performance when contract rescinded or altered by agreement

Obviously – though it is always reassuring to see that it is confirmed by the Act – there is no obligation to perform a contract which the parties have agreed to rescind. If A has agreed to perform a service for B, but A and B agree that the contract should be scrapped, treated as though it had never taken place, they are free to do so: who could have any greater right to do this than the parties themselves? Similarly, if they agree to scrap the original contract and replace it with another, who could possibly prevent them? As Section 62 says:

62. Effect of novation, rescission, and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

We dealt with novation in the last chapter.³⁸ That is where all agree to alter the personnel who were party to the contract by replacing one of the original parties by

³⁶ *State Agricultural Marketing Board v The Burmese Agencies Ltd* (1960) BLR 206 (SC).

³⁷ Limitation Act 1909, Article 52.

³⁸ Chapter 5.10(a).

another. As Illustration (a) to Section 62 explains, if A lends money to B, and then A, B, and C agree that C shall replace B as borrower or debtor, then C becomes debtor, and the original contract between A and B is one which B is no longer required to perform. In technical language, there has been a 'novation'. The original, superseded, contract, is replaced by a new contract with the result that the original contract no longer has to be performed. If only some, but not all, of the parties assent to the new arrangement, there will be no novation.³⁹

We now turn to rescission (or alteration) of a contract by agreement. If parties to a contract agree that the original contract shall cease to bind them and shall be replaced by a new one, on terms which are similar or different, the effect of such an agreement is that the original obligation is rescinded by agreement and is not required to be performed, because it has ceased to exist as an obligation at all;⁴⁰ it is replaced by the new contract which must now be performed. It does not matter whether the original contract has already been breached.⁴¹

As was said above in chapter 2, this consensual substitution of one contract for another does not contradict the doctrine of consideration: even if the only significant change is that one party assumes a greater burden than before, the obligation of the other remaining unaltered, there is no room for the contention that there is a lack of consideration. As Illustration (b) to Section 62 explains, if A owes \$10,000 to B, but A and B agree that this debt should be replaced by a mortgage granted by A in favour of B for \$5000, the new agreement extinguishes the old, which no longer has to be performed. If it were to be argued that there is a problem (and it should not be so argued, for Section 62 makes it perfectly clear that there is no problem) because one party is merely promising to perform an obligation, or part of an obligation, which he already owes to the other, and there is therefore no consideration for the new agreement, there are several answers, of which two may be mentioned. The first is that, in Myanmar, no consideration is needed to alter or vary the terms of an existing agreement: consideration is a requirement for the formation of a contractual relationship, but not for the alteration of that relationship. The second is that when the original contract was rescinded by agreement, the original obligation to perform wholly disappeared. When the new contract was formed, there was no existing obligation, and the new contract may be seen to be supported by its own consideration.

It has been held that where parties make a contract upon certain terms, and then agree that one of those terms should be varied, the alteration will not fall within Section 62, as there has not been, in substance, a complete rescission of the original contract.⁴² It is hard to see that this can be correct, for Section 62 uses the word 'alter'

³⁹ See Illustration (c) to Section 62.

⁴⁰ *U San Ya v PRMP SPL Firm* AIR 1936 Ran 396. See also *AC Akhoo v A Habib* (1952) BLR 236 (SC), at 246-47, which is not based on Section 62 but is certainly consistent with it.

⁴¹ One reason for this is that mediation may be a practical solution once there has been a breach; it would make such consensual resolution less helpful if it were too late to agree to a variation of the contract after it had been breached.

⁴² *Messrs IAG Mohamed & Sons v The East Asiatic Co Ltd* (1958) BLR 524 (HC) (only one clause of the contract was varied by agreement, leaving the rest unaltered. This was therefore the only change in the obligation by which the parties were otherwise still bound).

alongside 'rescind' and the marginal note to Section 62 also refers to the 'alteration' of a contract. Surely the point is this: if on a true construction of their acts the parties agreed that the entire contract should be set aside and replaced by another, this will count as a rescission of the original contract and creation of a new one; but if all they agreed was to alter or amend the terms of a contract which would otherwise remain the same, the original contract is not rescinded but continues to apply albeit in its amended form.

6.10 Release from performance when obligation dispensed with or remitted by promisee

We have just dealt with the case in which all the parties to a contract agree to replace it with another contract. It made sense that the law allows this to be done, because if all those who have an interest in the contract agree, there is no need for the law to interfere. The next point deals with the case in which the party who has an interest in the benefit of another's performance deals with it in a way which causes no harm, but does only benefit, to the other. Once again, the law takes the view that it has no need to interfere.

If a promisor under a contract is obliged to perform an act, but the promisee chooses to release him from the obligation to perform, whether wholly or partially, the promisor is released from performance to that extent, and the failure to perform the original promise is justified.⁴³ According to Section 63:

63. Promisee may dispense with or remit performance of promise. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

If the parties have made a contract, the result is a relationship made up, in terms of legal analysis, from duties and rights. For example, under a contract of lending and borrowing, the lender has a right to repayment of the sum loaned, with interest, if this has been lawfully agreed, and the borrower has a duty to repay the sum fixed by the contract on such date as the contract may specify. If it should happen that the borrower is unable to repay in full on the due date, he may approach the lender and ask for the time to repay to be extended, or for the sum required to be repaid to be reduced, or both. The lender may not agree: he is within his rights to insist on performance of the terms of the contract according to their strict letter. But if the lender is prepared to let the borrower pay less or take longer to pay, and accept this smaller or later payment as a full discharge of the debt, he is entitled to do that: it is his privilege to release the borrower from the strict duty to do what the borrower had promised to do.⁴⁴

⁴³ *Sakarchand Shamji v Ismail Hoosein* AIR 1931 Ran 189; *Ariff Moosajee Dooply v Dr T Chan Taik* (1950) BLR 227 (HC).

⁴⁴ See Illustrations (b) and (c) to Section 63.

And what is true for a contract of lending and borrowing is equally true for other contracts. If a potter has promised to make 100 cooking pots for a customer for a fixed price, but it becomes clear that he will only be able to complete 80 of them before he runs out of money, he may ask his customer to allow him to deliver 80 pots rather than the full 100 which had been agreed. If the customer agrees and the potter delivers the 80 pots, his failure to supply the missing 20 is justified and cannot be seen to be a failure to perform.

Why would a lender or a customer agree to this? The immediate answer is perhaps that it is the lender's business, or the customer's business, and we have no right to ask them to explain themselves. But there may be good commercial reasons for being generous to a borrower or to the potter. The relationship between the parties may be one which has gone on a long time, and the expectation of future business may be a reason to be a little forgiving on this occasion. And if the lender refuses to allow the borrower a little flexibility, and chooses instead to sue the borrower for performance of his obligation to pay in full, it will probably go badly for the lender. Legal proceedings may be slow, will be costly to bring, and by the time of judgment the borrower may have become bankrupt and unable to pay anything. There is therefore all the sense in the world in allowing the lender to let the borrower off part of the debt, and for customer to let the potter off part of the obligation, and for the law to regard this as binding.

Of course, there has to be an overt letting off: if all that happens is that the creditor does not immediately press his claim, but sits quietly by, this should not count as a dispensation, and Section 63 will not apply because of it.⁴⁵ If a dispensation or letting off is the product of fraud or misrepresentation or coercion or undue influence, it should not be, and will not be, effective. For example, if the borrower lies about his financial difficulties, the lender's dispensation or remission will have been obtained by improper means. Now if consent to a contract is obtained by such means, the contract may be avoided. By parity of reasoning, a dispensation or remission of performance, or the acceptance of satisfaction which is obtained by equivalent means, may be avoided, for the same reasons. The same is true if the acceptance of the payment is 'under protest' or 'without prejudice' or 'with full reservation of rights'.

If the creditor says that he will accept the (reduced) performance of the debtor as satisfaction of the debt, and the debtor performs, Section 63 certainly comes into effect.⁴⁶ What is the position if the creditor says that he will accept a reduced performance, but the debtor does not actually pay or do anything at all? The early view of the Myanmar courts was that if the debtor does not even make a start in performing the (reduced) obligation which the creditor has stipulated for, the original contract remains in full effect. However, in coming to this conclusion the courts were treating

⁴⁵ *Pannalal Rangalal v Tin Tin U* (1954) BLR 19 (SC).

⁴⁶ *Sakarchand Shamji v Ismail Hoosein* AIR 1931 Ran 189; *Ariff Moosajee Dooply v Dr T Chan Taik* (1950) BLR 227 (HC). The principle was even applied where the (reduced) payment was made in non-legal Japanese 'currency' (but to which the Japanese Currency (Evaluation) Act 1947 subsequently applied) during the years of the war: *Messrs Dawson's Bank Ltd v Ko Sin Sein* (1960) BLR 394 (HC): the payment and the acceptance were sufficient to satisfy Section 63.

the debtor as not having accepted or provided consideration for the creditor's offer,⁴⁷ drawing the conclusion that the creditor's offer was ineffective.⁴⁸ The error in the reasoning of the courts was to read Section 63 as though it required a fresh contract, with proposal, acceptance, and consideration, to supersede the original one. The High Court⁴⁹ overruled these cases when it pointed out that Section 63 simply required the creditor to state⁵⁰ that he would accept a reduced performance, and that as soon as the creditor had made this statement, it took effect according to its terms. No question of acceptance, or of the presence or absence of consideration, arose.⁵¹

The rule established by Section 63 is in sharp distinction from the position in English law, according to which this letting off might not be binding on the lender or the customer. This is because⁵² English law would ask whether there was a contract to let the borrower off part of the debt; and it would be likely to come to the conclusion that there was no such contract, because there was no consideration for the lender's promise to let the borrower off part of the debt, if all the borrower did was to perform (part of) an obligation he already owed to the lender. It is fair to say of English law that having argued itself into this corner, it invests much effort in trying to escape from it again (through the famous doctrine of promissory estoppel).

The Myanmar position is much more sensible.⁵³ The effect of Section 63 is as though the right to receive performance from the debtor or the potter is treated as though it were a piece of intangible property.⁵⁴ If the owner of that intangible property - the lender or creditor, or the potter's customer - wishes to give away or surrender all or some of that right, that property, as though it were a gift, the law does not stand in the way of a sensible decision, freely taken.

⁴⁷ *ALMS Subramoniam Chetty v Gangaya* (1907-08) LBR 365.

⁴⁸ *Maung Pu v Maung Po Thant* AIR 1928 Ran 144, (1928) ILR 6 Ran 191; *Sakarchand Shamji v Ismail Hoosain* AIR 1931 Ran 189; *Ma On Baw v VEPR Chettyar Firm* (1935) AIR 188 (Ran).

⁴⁹ *AKACTAL Chettyar v AKRMMK Firm* (1938) RLR 660, AIR 1939 Ran 84, following the decision of the Privy Council in *Chunna Mal Ram Nath v Mool Chand Ram Bhagat* (1928) 55 Ind App 154, AIR 1928 PC 99.

⁵⁰ As distinct from 'propose': there is no need to look for proposal and acceptance of it.

⁵¹ *AKACTAL Chettyar v AKRMMK Firm* (1938) RLR 660, AIR 1939 Ran 84. The case is also authority for the proposition that Section 63 allowed a third party (Debtor 3) to the agreement (made between the Creditor and Debtors 1 and 2, to accept reduced performance from Debtors 1, 2, and 3) to take advantage of it. No question of privity arose in connection with Section 63. The case was approved and applied in *S Samuel v KRS Annamalay Chettyar* (1951) BLR 17 (HC).

⁵² As we explained above, Chapter 2.4.

⁵³ And if there any doubt about it, which there is not, the departure from the curious requirements of English law is deliberate: see the decision of the Privy Council on appeal from an Indian court in *Chunna Mal Ram Nath v Mool Chand Ram Bhagat* (1928) 55 Ind App 154, AIR 1928 PC 99.

⁵⁴ For the general proposition that contractual debts and other choses in action are (intangible) property, Transfer of Property Act, ss 130-137; see also *Dawson's Bank Ltd v C Ein Shaung* (1951) BLR 300 (HC).

7

Remedies for Breach of Contract (1): Rescission of the Contract

Putting an end to the contract because there has been a repudiatory breach

We start our examination of breach of contract with the provisions of the Contract Act which allow a party to put an end to, or terminate, or rescind, the contract on the ground that the other party has indicated by word or deed, sufficiently clearly and sufficiently unambiguously,¹ that he will not perform his side of the contract or, as it sometimes said, has repudiated the contract. According to Section 39:

39. Effect of refusal of party to perform promise wholly. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

A rule closely related to Section 39 provides for the case in which a party is prevented from performing by the other party preventing the event on which performance is due. According to Section 53:

53. Liability of party preventing event on which the contract is to take effect. Where a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

The law on putting an end to a contract on account of the other party's failure or refusal to perform, or (which is to say the same thing) on the rescission of the contract for breach, which is framed by these two sections of the Act, can be organised under five points, which are as follows:

1. The power to put an end to the contract, or not, lies with the promisee;
2. The problem with the terminology used by the Act;
3. The nature or extent of non-performance which allows the promisee to put an end to the contract;

¹ *EE Master v Garrett & Taylor Ltd* AIR 1931 Ran 126 the dramatic remedy made available to the promisee does not arise if the language is less than plain.

4. Breach by failure to perform on time;
5. The promisee's options.

7.1 The power to put an end to the contract, or not, lies with the promisee

It is obviously sensible that the law allows a party to put an end to the obligations of performance which were created by the contract if the other party has dug in his heels and refused, and still refuses, to perform.²

Section 39 makes it clear that the decision to put an end to the contract is taken by the party who is not in breach. A contract is not brought to an end by the breach or refusal of the party who refuses to perform, but by the decision of the promisee, whom we will sometimes refer to as the 'innocent party', to accept that it is time to put an end to the contract. We may say that the innocent party has an option³ to put an end to the contract,⁴ even though there may be circumstances in which there may be an option but there is in practice not much of a choice to be made: for example, if in a contract to sell oil or a car, the seller has used the oil, or has sold and delivered the car to another person, there is not much point in the buyer insisting that the seller make delivery in accordance with his promise. In such circumstances the seller may have disabled himself from performing his contractual obligation, and the only practical way forward is for the buyer to put an end to the contract and claim such compensation for the breach of contract as the law may allow or the contract may provide. Even so, it is important to realise that it remains his choice to put an end to the contract.

7.2 The problem with the terminology used by the Act

The language used in Section 39 is clear and precise when it speaks of the promisee putting an end to the contract. It would carry the same meaning if it had referred to the promisee terminating the contract: each expression conveys the sense that the contract is a valid one, but that the promisee has tired of waiting for the promisor to fulfil his obligation.

However, that clarity is lost when Section 53 refers to the (repudiatory) breach as rendering the contract 'voidable'. Section 53 then links to Sections 64, 65 and 75, where the innocent party is said to have the option to 'rescind' the contract that is

² *Pannalal Rangalal v Tin Tin U* (1954) BLR 19 (SC).

³ It is an option, not an obligation: *Etbari v Bellamy* AIR 1938 Ran 207. The option to put an end to the contract may be exercised by the promisee if the promisor has announced in advance his refusal to perform even if the date for performance has not yet arrived: *Abdul Razak v U Paw Tun Aung & Co* (1950) BLR 258 (SC), but the option is entirely with the promisee (in that case, the pledger, who promises to redeliver): see at p 268.

⁴ For further illustration, *G Kyi Maung v Morrison & Co* AIR 1933 Ran 399, (1933) ILR 11 Ran 506 (refusal of buyer to accept milling notice a repudiation which permitted, but did not oblige, the seller to put an end to the contract).

voidable because of the other party's (repudiatory) breach. The opportunity for confusion is all too apparent.

The process of putting an end to a contract because of a failure by the promisor to perform was similarly traditionally described in other common law systems as the 'rescission' of the contract. It would be unfortunate if this terminology were to confuse the matter by appearing to elide rescission of a contract because consent to it was not free, as where the contract was induced by fraud, misrepresentation, coercion or undue influence, with the putting of an end to the contract because of its breach. The two are not the same because the latter does not 'wipe away' the contract, or render it void, on the basis that it was flawed from the start: it leaves the contract in place up until the time that the contract is ended. The most important practical consequence is that, while this is not possible if the contract has been rescinded because the consent was not free, damages for breach can be awarded even though the contract has been ended.⁵ Section 53 says so, and Section 75 underlines the point:

75. Party rightfully rescinding contract entitled to compensation. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Rescission for the non-performance, or non-fulfilment, of a contract is therefore very different from rescission of a contract which was voidable from the start because the consent was not free.⁶ In the case of rescission of a contract for breach, the essence of the complaint is that the promises of the contract were not fulfilled, that the obligations created by the contract were not performed. Although these promises now cease to be obligations which must be performed, they still provide the framework for assessing the measure of any compensation. Where a contract is rescinded for breach, the contract is not treated as though it had never been made. The contract provides the template for the assessment of compensation by asking what the financial position of the promisee would have been if the contract had been fulfilled, and comparing that with the position he is now in. That could not be done if the contract had been 'wiped away' (that is, rendered void) from the start.

Put another way, the Contract Act requires Section 75 because, without it, there would appear to be no basis for compensation to be claimed or ordered. If one were truly to treat the contract as voidable for breach, so that on rescission the contract is made void, there would be no contractual basis for the compensation.

It might have been better, therefore, if the Contract Act had followed through consistently the terminology of Section 39 and had referred throughout to putting an end to or termination for breach – and to the contract being terminable⁷ rather than becoming voidable – rather than rescission for breach and the contract becoming

⁵ *Muralidhur Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35.

⁶ It is not clear that this distinction was observed in *Etbari v Bellamy* AIR 1938 Ran 207, where the court seemed to treat rescission on account of the failure to perform as though it were a case of rescission of a voidable contract in the sense in which Section 64 uses the term, but as the employer had done neither, but had simply declined to pay what was not due, the issue was not decided.

⁷ Indeed s 35 of the Specific Relief Act 1877 does refer to the contract being voidable or 'terminable'. But that is also rather confusing as s 35 is dealing with *judicial* rescission.

voidable for breach. But that is not what was done. For better or worse, the Contract Act in sections 53, 55, 64 and 75 uses 'rescission' and the contract becoming 'voidable' as the term of legal art applicable to a breach which entitles the innocent party to end the contract. We must therefore follow that terminology while always being aware of the need to distinguish between a contract that is voidable and is rescinded because there is no free consent and a contract that becomes voidable and is rescinded because of breach.

7.3 The nature or extent of non-performance which allows the promisee to put an end to the contract

It would be wrong to read Section 39 as though it said and meant that as soon as there is the slightest breach - the slightest shortcoming in the performance of the promisor - the promisee may pounce on it and put an end to the contract. This point is admittedly tricky, because it involves accepting that Section 39 does not mean what it may appear to say. We may as well start with this point.

(a) How substantial must the failure to perform be?

Section 39 speaks of the promisor refusing to perform 'his promise in its entirety'. We must be careful with the meaning of this expression. Of course, in the example given earlier, of the seller who sells the contract goods to someone else, the promisor will now not be able to perform any of his promise: his behaviour has made it impossible for him to perform any of his promise: it has made it entirely impossible for him to perform, as one might say. But Section 39 may still apply if the promisor has performed part of his promise. The Illustrations to Section 39 refer to a singer who agrees to sing twice a week for eight weeks, and fails to perform after the end of the third week. The Act says that the manager of the theatre is entitled to put an end to the contract, and this must be taken to be the law. It would not be correct to say that the singer has entirely failed to perform her promise: she has performed six concerts, after all, precisely as the contract required her to. If this is nevertheless a case in which she 'has refused to perform...her contract in its entirety', it would be because she has not performed the entirety, the whole, of her contract. In other words, a single breach of contract would mean that she has not entirely performed her contract, and the promisee would be entitled to rescind (in the sense of put an end to) the contract.

This is not wholly satisfactory. It cannot be correct that a single failure to perform a promise of a contract which contains many promises will allow the promisee to pounce on a trivial or minor breach and rescind the contract there and then. It cannot be correct that a promisee, who now wishes that he had not made the contract which he did make, can seize on the smallest imperfection in the promisor's performance to escape from the continuing obligations which the parties, by their contract, had created. No developed system of contract law can operate on this basis. It must be a requirement of the law that the failure of performance by the promisor be serious. If it is not serious enough, there will still be a right under Section 73 to claim compensation for loss caused by the breach,

but there will be no right to rescind the contract. What Section 39 is concerned with is a refusal to perform one of the central terms of the contract, or a refusal to perform a promise which affects a vital part of the contract.

Take the case of an employee who works for a commercial organisation. Suppose she breaches her duty to serve her employer faithfully by divulging confidential information to a rival company, but in every other respect performs the duties of her employment. In this case the refusal to perform, the breach, is of a central term of the contract; the breach is one which strikes at the heart of the contract. In such a case there is no doubt that Section 39 will allow the promisee employer to bring the contract of employment to an end. If by contrast an employee, who is required to report for work at 8 o'clock every morning, arrives 15 minutes late on one occasion, it is technically accurate to say that he has failed to perform the entirety of his contract of employment; it is equally clear that in such a case Section 39 does not allow the employer to rescind (that is, put an end to) the contract.

Some writers, and some judges, consider it helpful to use the language of a 'repudiatory' breach to convey the true meaning of Section 39. In the way in which this suggests a fundamental denunciation of the contract, a decision to treat the contract or the promise, or both, with complete disrespect, this may be thought to be helpful terminology. Others prefer the idea of 'renunciation' of the contract, which conveys the sense of the promisee treating the contract as something by which he no longer considers himself to be bound or obliged. Both may be thought helpful in capturing the essence of the distinction between breaches which are not so serious and breaches which are really serious. Still others differentiate between repudiation and renunciation.

The multiplication of terminology can be dangerous. Section 39 does not use the language of 'repudiation' or 'renunciation'; and nor, plainly, does it require bad faith, disrespect, or contemptuous behaviour, to be shown on the part of the promisor. The promisor may have had little real choice; she may still be said to have failed to perform the contract in its entirety. However, it is necessary to find a way to convey the idea that the failure to perform is a failure of a kind which allows the contract to be put to an end, and 'repudiatory' is probably the best available description. It is for this reason that we have used it to refer to the kind of breach which, according to Section 39, allows the contract to be rescinded (that is, put to an end).

(b) Cases where it is not known how serious the refusal to perform will be

It may be that one way to avoid the uncertainty which may result from Section 39, which arises from the fact that it is not designed to encompass every single failure to perform, is for the parties to include in their contract an express statement of the promises or terms whose breach will, or the breaches which will, entitle the promisee to rescind the contract. In the context of employment, or of contracts of personal or professional service, this makes excellent sense.

Suppose, however, that this has not been done, and that the impresario, in whose theatre the singer had promised to perform, does not know, on the basis of one night's absence, whether this marks the start of an indefinite period of non-performance, or is just a short-term, temporary, interruption in normal service. What is he supposed

to do, when the next concert may be only 24 hours away? Suppose the owner of goods which are to be carried by road or sea discovers that the carrier company has not arrived at the agreed time, and that it is unclear whether it is just running a little late or that it is simply not going to come. Suppose the limousine which is supposed to get me to Yangon airport does not appear at the agreed time: is the breach of the promise to arrive on time one which allows me, there and then, to put an end to the contract and make alternative plans? Or does the law require me to wait and see how serious the breach really turns out to be and risk missing my flight by doing so?

There are two answers to the question. The first has to be that, in those cases in which it is not realistic or sensible to expect me to wait and see, I am entitled to act to put an end to the contract. We need to use common sense as our guide. If the carpenter who has agreed to come to my house this morning to repair the door has not arrived precisely on time, no-one would suggest that I can rescind (that is, put an end to) the contract: if I claim to have done so when he arrives 30 minutes late, he will be entitled to say that my refusal to allow him onto the premises to do the work is a refusal by me to perform my side of the contract: cases like this can, in the end, only be resolved by negotiation or by a judge. But if I have perishable goods, or have a customer who will sue me if I fail to deliver the goods I have promised to deliver to him on time, or I have a flight to catch, it would be silly to suggest that I am required to wait and see whether the lorry or the vessel will appear.

The second raises a more general question about the effect of dates in contracts, which is examined under the next point.

(c) The terminology of conditions, warranties, and innominate terms

The law on putting an end to the contract, contained in Section 39, appears to be based on a judgment that the non-performance is of a kind which justifies this response by the promisee. There is, however, another way of addressing the issue whether the case is one in which the contract may be rescinded or put to an end, which would be to identify the particular term of the contract which had been broken as one which would always allow, or may allow, or would in no circumstances allow, the promisee to end the contract. This tripartite division of terms is well established in other common law jurisdictions, with the nomenclature of *conditions* (terms which, if broken, will always allow the innocent party to put an end to the contract), *warranties* (terms which, if broken, will never allow the innocent party to put an end to the contract), and *innominate terms* (terms which do not have a name, and which may or may not justify an end being put to the contract, the decision in the particular case depending on the seriousness of the consequences of the breach). This description of terms is not found in the Contract Act, although the terminology of conditions and warranties⁸ plays a significant part in the Sale of Goods Act 1930.

⁸ The original provisions of the Contract Act 1872 dealing with contracts for the sale of goods (Sections 76 to 123) made extensive use in this context of 'warranty' but not of 'condition' as a type of contract term.

The advantage of this scheme for the characterisation of terms is the opportunity which it offers to the parties to know in advance, at least where the term broken will be a condition or warranty, whether a breach of that term will be one which allows the contract to be rescinded. The designation of a term of the contract as a condition or a warranty would be one over which the parties, in principle at least, would have control; and if the parties were to designate a term as a condition they would immediately know what the consequences of its breach would be.

But for good or ill, and reform here would seem beneficial, this technique of common law contract law is not part of the Contract Act, and not, apparently, part of general Myanmar contract law. It follows that the question whether, in any case of non-performance, Section 39 allows the contract to be rescinded (or put to an end to) is to be answered in accordance with the law which we have set out above.

7.4 Breach by failure to perform on time

A contract will often provide for a promise to be performed on a certain date or at a certain time, and the question naturally arises whether the other party is entitled not to perform his promise if the first promisor fails to perform on the date specified. According to Section 55:

55. Effect of failure to perform at fixed time in contract in which time is essential.

When a party to a contract promises to do a certain thing at or before a specified time, or certain things before certain specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as had not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure where time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. In the case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

If the failure of the promisor to perform on time is one which allows⁹ the promisee to rescind (that is, to put an end to) the contract, and he does so, then as with cases falling under Section 39 the promisee is no longer required to perform his own promises. If this

⁹ It does not oblige: *B Dey v LJ John alias JJ Lynch* (1900-02) LBR 21. The Court's conclusion as compensation is very hard to understand, because it appears to proceed on the basis that the plaintiff was compelled to accept that the contract had been cancelled, and that recovery should be limited to what was lost by non-performance. This makes no sense.

is not the case, then the promisee remains liable to perform his own promises, but may sue for compensation for any loss which he has sustained by reason of the lateness in performance. Two immediate questions therefore arise. The first is whether the contract is one for which the date of performance was unusually critical; the second is the effect of the promisor not performing on time on the obligations of the promisee, who must at least be excused from the immediate obligation to perform.

(a) Is the time or date of performance critical?

In many contracts the date specified for performance will not be treated as a term which, if not complied with, will allow the other party to rescind (that is, put an end to) the contract. This often comes as a surprise to ordinary people (and to some lawyers), but the explanation is easy enough. The practical circumstances of life are such that although the parties may provide in their contract a date or time for performance, this may become unachievable because the train was late, the post was unreliable, the traffic was at a standstill, the power went down, or even because the promisor was not as diligent as she might have been. If the failure of the promisor to meet the date stipulated in the contract were to mean that she had failed to perform her promise in its entirety, her lateness may be considered to be a breach which allows the other party to rescind (that is, put an end to) the contract as well as claiming compensation for any loss or damage caused by the breach.

Section 55 explains why this is not so, and shows that a stipulation as to time occupies a special place in general contract law. A contract may become voidable – liable to be rescinded – if time was intended by the parties to be of the essence of the contract, which in this context must mean that it was of the essence of this particular promise. Although the notion of time ‘being of the essence’ has been in use in the common law for a very long time, its meaning is a little elusive. It means that time is of such significance that non-compliance with that timing allows the other party to put an end to the contract. The reasoning which is used is, therefore, circular.

In fact, the rule does not depend on there being an express stipulation in the contract that time is to be of the essence, but upon the intention of the parties being to this effect.¹⁰ It will depend on the express words of the contract, the nature of the contract itself, and on the surrounding circumstances.¹¹ If the contract provides for penalties to be applied in the event of failure to perform on the stipulated date, that fact may well indicate that time was of the essence.¹² As indicated above, in commercial and shipping cases, as well as cases involving being driven to the airport,

¹⁰ *Maung Wala v Mg Shwe Gun* AIR 1924 Ran 57 (if seller is ready and willing to tender performance on the due date, but the buyer behaves in such a way as to make this impracticable, this will extend time for performance and will mean that time is no longer of the essence); *U Jama v Ma Bi* (1966) BLR 278 (CC).

¹¹ Which may include the behaviour of the parties as an indication of how urgent they seem to have regarded the date of performance as being, even in contract for the sale of land: *U Han v U Thi* (1959) BLR 278 (HC).

¹² *AKRMMK Chidambaram Chettyar v Khoo Hwa Lam* (1950) BLR 98 (SC); *U Htan Hmat v Daw Gon* (1957) BLR 73 (HC).

timely performance may very well be important, and the notion that the party who had expected performance on a particular date should wait around for an indefinite period, not knowing whether performance will be late or non-existent, is not a sensible one. Outside the context of commercial contracts time is not generally of the essence, but there are certainly many cases in which it still is. A contract for the delivery of flowers to my mother on her birthday is one in which the precise date for performance is crucial. Even if I do not inform the florist that the date is of central importance, she probably does not need to be told. But otherwise, the law generally takes the view that dates in contracts are aspirational, rather than strict pledges.

(b) Consequences of failure to perform on time if time is of the essence

If the contract is one in which time is of the essence, a failure to perform on time, or a refusal to perform on time, will allow the promisee to rescind (that is, to put an end to the contract). As we have explained above, the use of the term ‘voidable’ is in this context unfortunate; but no harm is done as long as it is recalled that Section 75 will allow the party who rescinded the contract to sue for damages in respect of loss caused by the non-fulfilment of the promise. It will also follow, as a matter of logic and of law, that his obligation to perform any promises of his own is at an end: it is not that he has a lawful excuse for non-performance, but that he has no obligation to perform any more.

7.5 The promisee’s options

If the promisor has brought himself within the range of conduct to which Section 39 applies, the promisee is at liberty to rescind or not to rescind.

(a) Rescinding the contract

First, she may exercise her option to rescind (that is, put an end to) the contract. If this is done, the promises which the contract obliged each party to perform no longer require performance. Indeed, when a contract is rescinded for breach, there is no longer any question of either party requiring the other to perform what was promised. While these propositions may seem obvious, there is some puzzle as to where they are to be found in the Contract Act. It would appear that, like rescission on the ground that there was no free consent,¹³ rescission for breach means that the contract becomes void. Indeed, *obiter dicta* of the Privy Council support the view that, on rescission for breach, the contract becomes void.¹⁴ But it is plain that a claim for compensation may still be brought by the innocent party in accordance with

¹³ For discussion of this issue, see generally Chapter 4, above.

¹⁴ *Muralidhar Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35 (decision of the Privy Council on appeal from the High Court of Calcutta).

Sections 73 and 75, and if the contract contained a term which fixed in advance, or 'liquidated' the damages which would be payable on breach,¹⁵ that term will remain operative. This is not easy to reconcile with the idea that the contract has become void but that appears to be how the Contract Act views the matter.

What about benefits conferred under a contract that has been rescinded for breach? Where a contract is rescinded for the other party's breach, Section 64 provides that the party rescinding (that is, the party who is not in breach) must make restitution to the contract-breaker of benefits received under the contract.¹⁶ And to ensure that an innocent party can equally have restitution of benefits it has conferred on the party in breach, it would appear that Section 65 is applicable in line with the argument that, once rescinded, the contract becomes void. We shall return to this question in Chapter 10.

(b) Refusal to rescind the contract

Second, the promisee may refuse to agree or to accept that he should now rescind the contract.¹⁷ Although it may seem a strange thing to do if it is simply impossible for the promisor now to perform his promise, there may be other cases in which it makes more sense. Suppose in a contract of employment it is provided that an employee must be given two months' notice to bring the employment relationship to an end, and also that an annual bonus payment will be made to every employee at the end of the year. Suppose that the employer tells the employee that he is being dismissed from the employment: perhaps the employer wishes to deprive this employee of the right to what would otherwise be a substantial bonus payment. The employee may refuse to accept that the contract should be brought to an end, and may continue to insist that he retains his status and rights as employee until the end of the period of notice which the employer would have had to give if he were to have complied with the terms of the contract.

There may be special cases, such as agency, in which a refusal by the principal to treat the agent as agent does automatically bring the agency to an end, whether or not the agent chooses to put an end to the contract.¹⁸ But agency is a special case, and even here the agent retains his remedies for breach of contract.¹⁹ Similarly, if the manager of the national football club is wrongly sacked in circumstances which do admittedly breach his contract of service, he can hardly point to Section 39 and say that he declines to exercise his option to rescind the contract, with the consequence that he will be picking the team for Saturday's match: that would be absurd, and whatever else the common law is, it is never absurd. The correct analysis is that he is

¹⁵ If by contrast the contract provided that on the occurrence of certain events a sum of money would be paid, as will sometime be provided for when a relationship such as commercial distribution is terminated, this is not a liquidated damages clause, but a term providing for a particular kind of performance on the occurrence of certain events. It will not be operative if the promisee exercises his option under Section 39 to put an end to the contract.

¹⁶ *Muralidhar Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35.

¹⁷ *B Dey v LJ John alias JJ Lynch* (1900-02) LBR 21.

¹⁸ Contract Act, s 201. ¹⁹ Contract Act, s 205.

no longer the manager, but that he may continue to claim the benefits of his contract until the termination of the contract according to its terms. Of course, if the club says that the manager refused to perform his contract to manage the team successfully, and that the correct analysis is that the national association exercised *its* right under Section 39 to put an end to the contract, the dispute between the parties will be principally resolved on the question of interpretation of the promises created by the contract, and hence on the question of which of the two committed a repudiatory breach.

If the promisee makes it clear that she is not exercising the option to put an end to the contract, then as the option has been set aside by the promisee in this way, it is lost and gone: it cannot be brought back if the promisee changes her mind at a later date. In the Illustrations²⁰ to Section 39, if the singer who had absented herself from two performances, returns to the theatre and continues to sing, the option which the impresario had to put an end to the contract is lost by deliberate non-exercise, and though the singer may be liable to pay compensation for the loss caused by her absence, the contract will continue in effect.

²⁰ Though the Illustrations are technically not part of the Sections of the Act, they have been provided by the legislature as being helpful in the working and application of the Act, and are to be understood accordingly; rejecting them as repugnant to the section would be justified only in the very last resort: see to this effect *Mahomed Syedol Ariffin v Yeoh Ooi Gark* (1916) LR 43 Ind App 256, AIR 1916 PC 242 (decision of the Privy Council on appeal from the Court of Appeal of the Straits Settlements). A rather less respectful view of the Illustrations was given in *Myingyan Municipality v Maung Po Nyun* (1930) ILR 8 Ran 320, but the Privy Council decision was not referred to by, and presumably not cited to, the court.

8

Remedies for Breach of Contract (2): Monetary Remedies

The law on the recovery of agreed sums, and damages for breach of contract

We turn to consider the main principles of the law on compensation for breach of contract. It is important to understand that although the principles may be reasonably straightforward, the way they apply in real life can be difficult, and the way they work in commercial litigation much harder still. But no matter how complex the case may be, the foundations are all the same.

For the purposes of this chapter we are principally concerned with three provisions of the Contract Act: Sections 73 to 75. That is to say, we assume that the promisor is in breach of contract and that the promisee, who argues that it has sustained loss or damage as a result, sues to recover compensation. That is the principal concern of this chapter.

But before we examine damages for breach of contract, it is necessary, as a matter of logic and law, to deal with suits to recover an agreed sum, such as a suit brought by a seller of goods for the agreed price or by a provider of services for the agreed fee.

We will examine the law under ten points, which are as follows:

1. Suits for an agreed sum;
2. Compensation for breach of contract in outline;
3. The general principles governing compensation for breach of contract;
4. 'Loss or damage': the meaning of each term;
5. 'Loss': identifying what exactly has been lost;
6. 'Caused to him thereby': the concept of causation and its application;
7. Losses which are disqualified because they are too remote from the breach;
8. Contractual agreement on the sum recoverable; liquidated damages;
9. The role of penalty clauses;
10. Compensation in respect of non-pecuniary damage.

8.1 Suits for an agreed sum

We saw in the previous chapter that the promisee, faced by a promisor who refuses or who has refused to perform his promise wholly, is permitted to rescind (that is, put an end to) the contract. If the innocent party exercises this power, then neither

party to the contract may be called upon to perform its promises, though a claim for compensation in respect of loss or damage caused by the breach may be brought. Such a claim is provided for by Section 73 of the Act, which we shall shortly examine; and if the parties had agreed in their contract that in the event of breach an agreed sum would be paid and received in place of the general claim for damages which Section 73 allows, then this may be recovered under the conditions set out in Section 74, which will also be examined below. Both are for the recovery of sums payable when there has been a breach of contract. According to some contract law theorists, the explanation is that the obligations of performance, created by the contract, which may be called primary obligations, are replaced by a secondary obligation, imposed by law (though they may be modified by the parties' agreement) to pay damages. But suits for an agreed sum are different.

(a) The differences between the two types of monetary claim

Let us consider the seller who, having delivered the goods, has not been paid, or the service provider who, having performed the service, has not yet received the fee which had been agreed. Are they also required to claim damages in respect of the loss caused by non-payment of the price or the fee? Conceptually, at least, it would be possible for them to do so, for the non-payment of money undoubtedly causes a loss, and a claim for damages would be possible.

There may, however, be several reasons why this would not be attractive. A plaintiff claiming damages bears the burden of proving the loss, as well as being vulnerable to the allegation that he or she has failed to act in such a way as would keep the loss to a reasonable minimum. It would be even worse if a court could look to Section 74 and reason that, although a sum had agreed to be paid, the court should cut the figure down to what would be regarded as reasonable compensation. A claim brought in respect of a high price or large fee might be reduced below the level agreed, which would mean that the non-paying defendant had managed to secure a financial advantage from breaking his promise to pay. That would neither be good sense nor good law.

An unpaid seller under a contract for the sale of goods is permitted by Section 55 of the Sale of Goods Act 1930 to bring a suit for the price. The lender of money is entitled to sue to recover the sum lent.¹ And it would be very surprising if an unpaid service provider faced any difficulty in bringing a suit for the unpaid fee. In all three, and in all such, cases, the advantage of being able to do so is that the usual limitations applied to a claim for damages are avoided. The action for the agreed contractual price, or its equivalent, is therefore brought as an action to recover the debt due and owing as an obligation created by the parties by their contract. It may be brought if an end has not been put to the contract; but if the contract has been rescinded or put to an end, the obligation to pay the price, the fee, or other sum by way of performance

¹ This should be obvious. The first plaint set out in the Forms which appear in Appendix A to the Civil Procedure Code 1909 suggests that all the lender has to plead is that the debt was payable on a certain day; that it has not been paid, and the sum claimed as relief.

will have ceased to be enforceable, and any monetary claim will have to be for damages.²

(b) Claims for the sum agreed as the price or the fee

The unpaid seller or provider may, in line with the analysis above, sue for the price or the fee. The seller has her right to do so confirmed by the Sale of Goods Act; the service provider does not, and has to rely on the fact that, as the Contract Act gives him the right not to rescind the contract or put it to an end, it must follow that he can sue to recover the sums which the contracting parties agreed as constituting performance of the contract. It remains a slight concern that the Contract Act does not say so, but as it explains at the beginning, the Act does not purport to be a complete and exhaustive statement of the law of contract.

One possibility is that, apart from a suit for the price in accordance with Sale of Goods Act 1930, section 55, any other claimant has to proceed under Section 13 of the Specific Relief Act, which appears – particularly by its Illustrations – to allow a suit for specific relief to be brought to recover a payment which the defendant had contracted to make but had not paid. The problem with that as a solution is that specific relief for a quantified sum of money – as distinct from a periodical payment – is not usually thought of as possible; and decrees of specific relief are in every case discretionary: the idea that an unpaid claimant suing for the sum agreed to be paid by way of performance should need to invoke the discretion of the court, rather than the right to enforce a promise, is not attractive. We therefore assume that an unpaid seller, provider of services, or similar plaintiff may bring a claim for the price or fee or other agreed sum.

The conditions for recovery will be that the obligation remains enforceable. So the contract must not have been rescinded, in any sense in which that term is used, and must not have become void by reason of supervening events; and on a true construction of the contract, the payment must now be due. This latter point may be illustrated by the following example. Suppose that a violin teacher agrees that she will give twelve lessons, one lesson every Friday for twelve weeks, to someone who wishes to learn, and that the parties agreed that the fee for the instruction will be \$500, payable at the end of the cycle. Suppose that two lessons are given, but that at the end of the second lesson the pupil tells the teacher that her services are no longer required. Suppose that for the next ten Fridays the teacher presents herself at the pupil's house, but is not allowed in. Suppose that after the twelfth Friday she sues for the price of \$500. Whether she may recover depends on whether she has performed those obligations of her side of the contract upon which the payment was due. If the contract provided that she must give twelve lessons, after which the fee will be payable and paid, she will not be able to recover the price, because she has not performed her side of the contract to the point at which the payment would be due. If by contrast

² In Myanmar law, because the contract is regarded as being void once rescinded for breach, and because there is no specific provision on this in the Act, it would appear that, once rescinded for breach, even past obligations to pay money cannot be enforced by a suit for the agreed sum.

the contract provided that she must make herself available to give lessons on twelve Fridays, and must give the lesson if the pupil wishes to be taught, she has performed her side of the contract; the payment is due; and she may sue for the price.

If it is held that on a true construction of the contract the price is not due, the only practical option for the teacher will be for her to put an end to the contract and sue for damages. But if she does that, the fact that she failed to take reasonable steps to keep her losses to a minimum – for example, by re-selling the lessons to another pupil – may mean that the claim for damages will yield a much smaller sum.

8.2 Compensation for breach of contract in outline

When there has been a breach of contract, the innocent party may be worse off than it would have been if the contract had been performed.

The Contract Act has two sections (ss 73 and 75) setting out circumstances in which a party who has broken a contract is liable to pay compensation for breach of contract. By far the most important of these is Section 73, which applies in every case in which a contract has been broken. Most of this chapter is therefore concerned with Section 73. The broad aim of compensation awarded under Section 73 is to put the party into the position which that party would have been in if the contract had not been breached. It provides as follows:

73. Compensation for loss or damage caused by breach of contract. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

...

Explanation. In estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

It can be seen that Section 73 operates on the basis that what the law should do is to ask what loss was caused by the breach, which it will do by asking what the position of the promisee would have been if there had been performance, rather than breach, by the promisor, and in principle this will be basis for measuring the loss or damage caused by the breach. From time to time we will describe this as the ‘as-if-performed’ basis for the assessment of damages. It is a forward-looking exercise whose focus is on how matters would have stood if the promise had been performed according to its terms. Of course, and as we shall soon see, the law places limits – some of them are quite restrictive – on what can be recovered, and the fact that some of the losses may be more speculative may preclude the court awarding compensation in respect of them. But this is the general principle, and it is by far the most common basis for seeking compensation for losses caused by the breach.

It is not necessary for the plaintiff to have put an end to the contract, or to have accepted that the contract has been repudiated by the promisor: all that Section 73 requires the plaintiff to show is the contract, the breach, and the loss or damage caused by it. This can be done whether or not the promisee has rescinded it for non-performance: the two remedies are connected, but are not inter-dependent. Although there is some difficulty because of the terminology of the contract being voidable and hence becoming void when rescinded, Section 75 removes all doubt. It provides as follows:

75. Party rightfully rescinding contract entitled to compensation. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

So, for example, if an impresario has put an end to the contract under which a singer had contracted to perform at the theatre every night for a month, because the singer has refused to perform, and has in that sense rescinded the contract, he is entitled to claim compensation for the damage he sustains through the singer's non-performance of the obligation which is, as a result of the rescission, no longer enforceable.³

8.3 The general principles governing compensation for breach of contract

We must now say more about the way a court deals with the question of compensation for breach of contract. The Act tells us that the party who suffers by the breach is entitled – and note that it is an entitlement,⁴ so the task of the court is to assess what the rest of Section 73 tells the court to award, rather than to operate some form of discretion – to receive compensation for any loss or damage caused to him by the breach.

This means that the court must calculate the figure which will put the plaintiff into the position which he would have been in if the contract had been performed rather than breached. To make the same point another way, the court should consider the position that the plaintiff would have been in if the contract had been performed in its entirety, should look at the position in which the plaintiff was put into when the breach took place, and calculate the difference between the two.⁵ That sum, in principle at least, will represent the loss or damage caused to the plaintiff by the breach, and that will be the sum, in principle at least, which the plaintiff is entitled to claim and recover.

³ Illustration to Section 75.

⁴ Even if the contract is one for which the court would be prepared (if the plaintiff were to apply for it) to decree specific performance, for compensatory damages is a right: *Ma Hla Po v Ma Sein Nu* AIR 1940 Ran 146.

⁵ For one of many examples, see *Gor Lum Hpaw v Camillo Camilatos* (1919-20) LBR 15 (compensation for brokerage fee which would have been earned if the sale had taken place).

We can take some easy cases first. Suppose A contracts to buy a quantity of rice from B, for delivery on a certain date, at a price of 50,000 kyats. Suppose that B does not deliver the rice, and when A goes to market to purchase replacement rice, A finds that the price has risen and A has to pay 80,000 for the same quantity. If A had not paid B in advance, A is entitled to recover 30,000 as compensation for the loss caused to A by the breach; if A has paid B in advance, A would be entitled to recover 80,000, because these are the figures which represent the loss caused to A by the breach.⁶ But if A had paid nothing in advance, and when he went to market he was able to obtain the rice for 50,000, he has suffered no loss and has nothing to be compensated for,⁷ though if he has incurred trouble and expense in going to the market to obtain the alternative supply, A will be able to claim in respect of that.⁸

Now suppose that A had contracted to buy a quantity of rice at a price of 50,000 kyats but that the seller does not deliver. If A could have sold the rice on at a price of 60,000, the loss which he sustains by reason of the non-delivery will be 10,000, and he may recover compensation in this sum.⁹

Now suppose that a seller was required to deliver a quantity of rice on a specific day, but is one week late in making delivery, and in that week the price of rice on the market falls. The buyer will be entitled to claim compensation for the difference between the price the buyer could have obtained for the rice on the day on which it should have been delivered, and the price he could have obtained on the day it was delivered.¹⁰

Now let us switch to suppose that the breach is by the buyer, who fails to take delivery. If the buyer had promised to buy from me at a price of 60,000 kyats, but when she fails to take delivery I have to go to market and sell the rice for whatever I can get for it. If I sell it for 40,000 my losses are 20,000, though if the buyer had paid a deposit which is now forfeited to me, say of 10,000, I must give credit for that sum and my damages will therefore be reduced to 10,000.¹¹

The general principle is easy to state, and to illustrate, but real life produces cases in which the principle is not always so easy to apply. It may be obvious that if a rice farmer makes a contract to sell a quantity of rice to a merchant, but then fails to deliver the rice contracted for, the merchant will need to go to the market to buy replacement rice, perhaps at a higher price. But what about the profits which the merchant expected to make on resale of the rice? What if the merchant had an unusually profitable contract in view, and now says that the losses are far greater than

⁶ For example, *Mohamed Esoof Ismail & Co v Khoo Sin Thwak* (1901-02) LBR 146. (It was alleged that the plaintiff had manipulated the market price, but the court declined to enter into investigation of the point, on the basis that the market rate was the market rate, and commercial certainty would be damaged by attempting to assess what factors had affected it. But the market price means the market price for replacement goods of equivalent quality, not necessarily of replacement goods from the same source, mill, field or factory: *Mahomed Bhoj Nansee Khairaz v Benjamin Meyer* (1903-04) LBR 12.

⁷ *Baldeo Singh v ML Sachdev* AIR 1934 Ran 107 (no loss because dismissed employee obtained replacement employment for the entire period on equivalent terms).

⁸ Illustration (b) to Section 73.

⁹ Illustration (a) to Section 73 which deals with the non-delivery of saltpetre.

¹⁰ Illustration (e) to Section 73. ¹¹ *U Shwe Lone v Kha Choung* (1957) BLR 106 (HC).

might ordinarily have been expected? What if the farmer decides not to sell to the merchant because of receiving a much better offer, and chooses instead to sell the rice and keep the profit: can the merchant make a claim to the profit made by the farmer? What if the rice merchant fears that his reputation will be damaged if it is known that he cannot fulfil the contracts which he has made, and that this damage to his reputation will give rise to further, real, financial losses? What if the rice merchant, when he learned of the breach of contract by the farmer, could have gone into the market and obtained replacement rice at a slightly higher price, but did not do so immediately, and by the time that he did, he finds that the cost of obtaining the cost of replacement rice was much higher than it was when he first learned of the breach?

These may all be simple examples but, in modern law, especially commercial law, although the contracts may be more complex, and the sums of money much larger, the legal problems are fundamentally the same. Section 73 requires a court to assess the loss and damage caused to the plaintiff by the breach, and to order compensation to be paid in that amount. This means that Section 73 has a lot of work to do: in cases large and small. It also means that the court must calculate the damages, and must explain the basis of its calculation, because unless a court explains how it arrived at the conclusion which it reached, it is impossible to see whether it applied the law properly.

8.4 'Loss or damage': the meaning of each term

We should start by asking what is covered by each of the words 'loss or damage'. We will start with loss.

(a) Loss

Loss means financial loss, loss of money. That may refer to the money which a person had but as a result of the breach of contract, now does not have; it may refer to money which it would have obtained if the contract had been fulfilled but which, because of the breach of contract, it does not obtain. It may refer to the money it paid for goods which were not delivered, and which it now wants back. It may mean the money which it spent in purchasing in the open market the goods which should have been delivered in fulfilment of the contract, which is money which it would not have spent if the goods have been delivered. It may mean the money which it spent in rectifying the work done or services rendered under the contract when the work or services did not fulfil the specifications of the contract: the cost of 'putting things right'. It may mean the profits or gains which the plaintiff would have been able to make if the contract had been performed, by selling the goods on, or by being able to enter into a separate profitable contract with them. In all of these cases the plaintiff may say, and the law *may* allow the plaintiff to argue, that the sum of money which is claimed is loss caused to the plaintiff by the breach of contract.

Where the loss is caused by a sale and purchase which does not take place, the first thing to do will be to identify the dates by reference to which the financial

calculation is to be done. For example, if the seller should have delivered a quantity of rice to the buyer on July 1, but when she fails to do this, the buyer does not go to market until July 8, when the prices may have risen or fallen, which is the day on which the losses are assessed? Does it make any difference if the buyer was just indolent, or had been hoping that prices would come down, or that he had spent the week trying to persuade the seller to deliver the rice? Or suppose it is the buyer who fails to take delivery, and the seller takes her time before selling the rice to someone else, perhaps because she hopes the price will rise, only to find that the price has fallen? On this particular point the Myanmar courts have taken a very strict view that it is the date of the breach of contract which counts,¹² and that the losses are assessed on the basis that the innocent party should have made a replacement sale or purchase that same day: loss means loss measured by reference to the market on the day of the breach, not earlier and not later:¹³ when you read the cases one can see how strict the courts have been about it. But not all cases are cases concerning the sale of commodities which are bought and sold on markets; and this is only one of many issues of detail which mean that although the principle is easy enough to state, the way it works on the facts of individual cases may not be quite so easy to demonstrate.

(b) Damage

It is not clear whether ‘damage’, in this context, has a distinct meaning, for lawyers tend to use the expression ‘loss or damage’ as an expression which covers all forms of diminution or depreciation, which may be easily assessed in money terms, as well as those which are less easy to put a value on. For example, if a taxi driver breaks a contract with a passenger by driving the vehicle in a reckless manner, as a result of which the passenger sustains a broken arm, the financial losses may be easy to quantify: medical expenses incurred, wages lost, and so on. But pain and suffering was also caused by the breach of contract; and if the law of contract allows compensation in respect of this consequence, it is perhaps more natural to refer to it as ‘damage’ than as ‘loss’, even though it is true that this is often referred to as ‘non-financial loss’.

¹² *Abdul Razak v U Paw Tun Aung & Co* (1950) BLR 258 (SC).

¹³ *AKAS Jamal v Moolla Dawood & Sons* (1915) 43 Ind App 6, AIR 1915 PC 48, [1916] 1 AC 175; *Maung Gyi Maung v Moosajee Agmad & Co* AIR 1916 LB 60; *Ismail Sowdagar v Ebrahim Abdulla Janoo* AIR 1917 LB 103 (where the assessment was based on the market price on the very day of the breach, and not five days later when the substitute was purchased. This does seem rather stringent); *Hunt Huat & Co v Sin Gee Moh & Co* AIR 1921 LB 78 (relevant market date the date on which performance was due, even if a valid tender was made and rejected at an earlier date); *Maung Po Kyaw v Saw Tago* AIR 1933 Ran 25 (relevant date in case of anticipatory breach is the date of due delivery, not the earlier date); *ALSV Chetty v Maung Kyin Ke* AIR 1922 LB 1 (relevant date the date on which tender was made, even if the plaintiff did not take delivery till later and so discovered the breach only later); *Ya Shakoore & Co v Finlay Fleming & Co* AIR 1923 Ran 265 (where payment was due in foreign currency, date of breach by non-payment is the date for ascertaining currency conversion rate). Where there is a difference between the market in various places, the loss is assessed by reference to the place of the breach: *SKRSL Chetty Firm v Amarchand Madhowjee & Co* AIR 1921 LB 75 (c.i.f. contract breached at place to which goods should have been sent, not place of failure to hand over the documents).

8.5 'Loss': identifying what exactly has been lost

Let us return to the meaning of loss. The law compensates a plaintiff for what it has lost: the guiding principle is to ask what the breach of contract caused the plaintiff to lose, always bearing mind – as we will see in a moment – that not every disadvantage which flows from the breach of contract can be said to be a loss caused by the breach of contract so far as Section 73 is concerned.

There are some cases in which a plaintiff may be able to argue that it has sustained or incurred financial loss, but the circumstances in which it has done so suggest to the court *either* that what it says was its loss may have been a loss but was not really the result of the breach, *or* that it was not a loss at all so far as the law is concerned. In either case, Section 73 will not allow compensation to be awarded in respect of it. We can take a couple of cases to demonstrate the point.

(a) Loss as the cost of 'putting it right'

Suppose a builder makes a contract with a client to build her a house, and that the contract specifies that the house is to be constructed on pillars so that the floor of the house is one metre above the level of the ground, which is prone to flooding. Suppose the builder completes the building, but that the height of the floor above ground level is just less than one metre. There is no other fault with the building, and there is absolutely no reason to suppose that the house will suffer from being slightly closer to the ground. The client, however, is very unhappy, and proposes to demolish the house and have it built to the original specifications. She may say that the whole of the cost of doing so will be a loss, caused to her by the breach of contract, and that she is entitled to compensation for that expense. It is likely that a court would disagree with her.

There are several possible reasons why compensation should not be ordered for the cost of demolishing and rebuilding a perfectly good house. One would be that the loss, the cost of re-doing the work, was remote and indirect, which means that the second paragraph of Section 73 would disallow it: we will deal with the detail of that in due course. Another might be that the loss is considered to have been caused to the plaintiff *not* by the breach of contract, *but* by the plaintiff's own independent decision to incur the expense and suffer the loss: one might say that the cause of the loss was not the breach of contract, even though it is true that the expense would not have been incurred if the contract had not been broken. Those would be two reasons to refuse compensation.

But as against this, there are many cases in which 'the cost of putting things right' can properly be used as the basis for compensation: the case of the buyer who has to go to the market to obtain his rice when the seller does not deliver what he had ordered will be entitled to compensation to cover the financial loss which he suffers and which is caused to him by the breach; the occupier who takes steps to remedy the defective repair done by her builder can recover the cost of doing so.¹⁴ If there is

¹⁴ This is the common law rule. There is also a statutory right under Transfer of Property Act, s 108(f), when the lessee has required the lessor to put right a breach of the lessor's covenants but the lessor has failed to do so: *NB Sen Gupta v U Jone Bin* (1951) BLR 77 (HC).

a distinction between the cases - and common sense strongly suggests that there is, or should be - what is the difference?

Courts in other common law jurisdictions have tended to say that the distinction between two classes of case runs along the following lines. In one, it is reasonable for the plaintiff to incur expense in making provision for what was not done or delivered when the contract was not fulfilled: in those cases, the plaintiff will be expected to act in a reasonable way, such as by going to market to make alternative provisions. In the other, it is unreasonable for the plaintiff to incur expense in 'putting things right', because they are already more or less right, and any substantial expenditure is therefore inappropriate. In these cases, it may be appropriate to allow a small sum to reflect the fact that the plaintiff did not quite get what she contracted for, but the loss caused by the breach of contract is very minor, and compensation should be very minor as well.

The difference between these two cases helps us to understand that what a court is required to do is to ask what the plaintiff has lost by the breach of contract which occurred: that is not quite the same as asking what the plaintiff has spent in response to the breach of contract. Not everything which the plaintiff says is a loss is one which the law recognised as a proper basis for compensation. What these examples show is that it is not always easy to say, in a satisfactory way, what counts as a loss.

Sometimes it all depends on how you look at a single set of facts. Even if there is an illustration in the Contract Act, it may not be sufficient. If we go back to the case of the house builder, Illustration (f) says this:

'A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.'¹⁵

This seems to be an example in which the difference between what the contract stipulated and what was done was substantial. Suppose a storm does severe damage to the tiled roof of B's house, and A agrees to repair the roof. Although the contract requires A to repair the roof with proper tiles, he instead uses sheets of corrugated iron to make a roof which will be perfectly secure against the bad weather, but which is very ugly to look at. No doubt a court would say that B is entitled to recover from A the cost of having the repairs done properly, for this is not a case in which B should be made to accept the result of the work actually done by A. In the case of the house built a little too close to the ground, however, it may be that the client should accept that the discrepancy between the contract and the actual performance is small, and the law should require him to accept it. Where is the distinction? The answer appears to be that one course of conduct is reasonable and the other is not. In the one case the benefit of full Performance is trivial compared to the cost to 'put it right'; in the other the reverse is true and the cost of putting it right is a proper basis for compensation.

¹⁵ See also Illustration (l) where the house is so badly built that it has to be rebuilt.

(b) Breach causing no loss

There will be other cases in which the breach of contract seems to cause no financial or other loss, but the plaintiff considers that he should receive compensation. For example, suppose I pay a courier 20,000 kyats to deliver an important legal document to a particular address. The contract requires the courier to deliver the document by his own hand, but suppose he gives it to an errand boy, and pays him 2000 kyats to deliver it instead, keeping the other 18,000. If the document arrives safely and on time, I am in the position in which I expected to be when the contract was fulfilled: it is also the case that I am in that position in circumstances which were not those I agreed to. I may argue that I have lost 18,000 kyats, or (which is another way of saying the same thing) that I could have paid 2000 kyats for delivery by a stranger, but paid the far larger sum of money because I wanted security and a guarantee of delivery. Have I suffered a loss?

In a case like this it is really very hard to see what the answer should be. Most people will probably agree that I have lost something, but when asked to say in detail what that something is, the answer is suddenly much harder to give. Some people may argue that what I have lost is the 20,000 kyats, but that is a very difficult argument to accept. For if the document was delivered - and, as it happens, it was delivered - I would not have the 20,000 kyats, which was the agreed price paid for the delivery. Ordering compensation in the sum of 20,000 kyats therefore puts me in a much better position than I would have been in if the contract had been performed. So that cannot be correct. It is no better if the suggestion is that I should receive 18,000 kyats in compensation, because if the document was delivered - and, as it happens, it was delivered - I would not have had that 18,000 kyats in my wallet either. When we ask 'what have I lost?', it is not completely easy to give a satisfactory answer. The truth may be that the defendant took a calculated risk, and in this case he got away with it and made a gain. The law does not find it shocking that a contracting party takes a risk, and perhaps we should not, either. Section 73 does not punish people who manage to make gains without causing losses to others.

The point is that we need to ask what the plaintiff has actually lost as a result of the breach, and we must then try¹⁶ to put a figure on that loss.¹⁷ The law does not allow the plaintiff to create or invent losses where there really are none; and it does not say that wherever there is a breach of contract there must, inevitably, have been a loss. So for example, if an employee's contract provides that he may only be dismissed after a formal investigation, but he is dismissed instantly, without one, what he has lost is not the right to remain employed to the retiring age, but the right to remain employed during the period of investigation, which is obviously much less.¹⁸

¹⁶ It may be very difficult to do this, for there may be little basis for a precise answer to be given, but the judge must try his best: *Tan Choo Kheng v Saw Chain Poon* (1956) BLR 490 (HC), at 502.

¹⁷ *Aung Khin Lat v U Khin Maung & Co* (1956) BLR 21 (SC) (customs duties would have had to be paid by importer under c.i.f contract, so this is added to the figure represents the cost which the imported would have borne and thus reduces the claim based on the actual market price).

¹⁸ *Secretary of State v D'Attoides* AIR 1934 Ran 381.

The final point, and the one to which we will have to return, arises this way. If I am the seller of rice, and I fail to deliver the rice on the date on which it was due, the immediate result is that the merchant who contracted to purchase it from me loses the rice which he had a right to have delivered to him. The law considers that to be a loss, and it has rules which put a value on it. But the merchant may also say that he has lost, not only the quantity of rice which I contracted to deliver, but also the profits which he stood to gain from trading with this rice. Perhaps he had already made contracts to sell it on at a profit, and if he is now unable to perform those contracts, he may have to pay compensation to his customer: is that a loss caused by the breach of contract? Perhaps he was intending to keep the rice till the market price rose and then sell it; and he cannot now do this: is that a loss? When questions of this kind arise, the answer which the law usually gives is that these may be losses, but they may be too remote or too indirect to justify compensation. We will postpone dealing with them until later.

8.6 ‘Caused to him thereby’: the concept of causation

The fact that there was a breach of contract, and that there was loss, does not always mean that the loss was caused by the breach of contract. If X steals my umbrella, and I go out into the street while it is raining and get wet, would it be right to say that X caused me to be soaked by the rain? One can guess that some people will say yes, and others will say no; and what this simple example shows is that the meaning of some event being ‘caused’ can be a flexible one. And that is another way of saying that the idea of causation is sometimes a complicated one.

(a) Loss or damage caused by the breach

Section 73 speaks of loss or damage ‘caused to him thereby’. Suppose I make a contract to sell something to a buyer, who refuses to complete the purchase. I might decide to sell the thing to someone else straight away, and if I do, and get less for it than the original buyer had promised to pay me, I can recover the difference as loss caused to me by the breach. But instead, I may decide to keep the thing and speculate about the way the market may move. If the market in fact goes down and down, so that when I sell the thing at a much lower price than I would have been able to get on the day of the breach, I cannot recover the additional loss, for that was caused by me: it was not the breach which caused the loss (even though the loss would not have happened without it); it was my own decision not to go into the market at the time. In those circumstances the loss to me is not caused by the breach,¹⁹ but by my own decision.

Now suppose I intend to purchase premises in Yangon for the purpose of my business, and I make a contract with a professional valuer to advise me whether the premises are worth the money which I am proposing to pay for them. He does not

¹⁹ *AKAS Jamal v Moolla Dawood & Sons* (1915) 43 Ind App 6, AIR 1915 PC 48, [1916] 1 AC 175.

perform his task properly, and reports that the building is in good condition when it is not. The result is that I pay 20% more for the building than I would have agreed to pay if the valuer had performed his contract properly; to put it another way, I would not have entered into the contract which I did enter into. But suppose that in the following year there is a collapse in property prices, and the building is now worth only 50% of what I paid for it. If I sue the valuer for breach of contract, is the loss caused to me by his breach the 20% extra which I paid over the real value, or the full 50%? The answer is (probably) that the valuer may be liable for the extra 20%, which represents the actual money lost as a result of his breach of contract, but not for the 50%, because that was caused by the general collapse in property values. It was not caused by the valuer's breach. We can demonstrate it this way. It is true to say that if the valuer had fulfilled his contractual duty to me, I would not have entered into the contract which I did make. In one sense, then, all the adverse financial consequences were triggered by the breach of contract. But I was looking to take premises in Yangon, and if I had not taken these, it may be assumed that I would have taken other premises, and if I had done so, I would have been hit by the same collapse in property values. The losses resulting from the collapse in the property market were not caused by the valuer's breach of contract, because they would have hit me in any event. The full loss may have been *triggered* by the valuer's breach of contract, but it was not *caused* by it.

(b) Loss or damage that could reasonably have been avoided by the innocent party

If the promisor fails to deliver what he should have delivered, or refuses to accept what he had contracted to accept, the law expects the promisee to take reasonable steps to keep the loss or damage to a minimum. For example, if the promisor refuses to deliver, the promisee may be expected, if it is reasonable for him to do so, to go into the market and obtain substitute supplies. If the promisor refuses to accept the services, the promisee may be expected, if it is reasonable for her to do so, to sell her services to another customer for the best price which can be had, and claim only the difference as damages. In short, the law expects the innocent party to take reasonable steps to limit the loss or damage, and if the innocent party is found not to have done so, it will be the innocent party, rather than the party who breached the contract, who will be treated as the cause of the loss which would otherwise have been avoided.

It would appear that this is the idea that directly lies behind the *Explanation* to Section 73 set out in the Contract Act. That reads as follows:

Explanation – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

In other common law systems, this is often referred to as the 'duty to mitigate' the consequences of the breach, which lies on the innocent party. It is, however, not illuminating to refer to it as a duty, for it is not an obligation which is owed to anyone else: it is simply a statement that if the other party fails to act in a particular way in

the face of the breach, he or she will bear responsibility for the financial consequences which are attributable to that failure. This mitigation principle may be the best explanation for why loss or damage was said to be irrecoverable in some of the Illustrations²⁰ provided in the Contract Act in respect of Section 53. It has been included here because on one interpretation of the law, this principle is not separate from causation but rather merely an aspect of causation.

Even if the court is satisfied by the plaintiff²¹ that the losses for which he claims compensation were caused by the breach of contract, there is a further issue to be confronted before the court will order compensation.

8.7 Losses which are disqualified because they are too remote from the breach

(a) The issue of principle

Section 73 is drafted on the basis that there are some losses, which can be shown to have been caused by a breach, for which it is fair or sensible to hold the party who had breached a contract to be liable, but other such losses for which it would not be appropriate to make the person who has breached the contract pay compensation. The law has to be like this. The Contract Act states the basic rule of Myanmar law on which commerce - whether at village, or township, or national, or even international level - is carried on. A person would have to be crazy to make a contract if the consequence of doing so was that he or she was absolutely responsible for every possible adverse consequence, no matter how unlikely or surprising it was, if things did not go entirely to plan. Every person who entered into a contract would do so at the risk of being ruined by it. This would make little sense in any society, but it makes absolutely no sense in a society which is now starting to become one in which commerce thrives and helps people to improve the standards of their lives. So the law places some limits on the risks to which a person who makes a contract is exposed if things go wrong.

Section 73 deals with this issue in two separate, but related, ways. Both of them suggest that there are losses which may well be caused by the breach, but for which Section 73 does not require the defendant pay compensation. The general principle is at this point easy to understand. In principle, if the defendant knew that if he breached his contract a particular loss was likely to occur, it is likely that compensation may be recovered in respect of that sum; if the defendant did not know of it when the contract was made, he will not be required to pay. We proceed to explain and to illustrate how this works.

²⁰ Most obviously Illustration (p) where B closes his mill because of the failure to deliver 500 bales of cotton by A (although, depending on further facts, that could illustrate remoteness).

²¹ It is the task of the plaintiff to satisfy the court on the figures, but if the defendant puts in no evidence to challenge them, the court is likely to accept the plaintiff's evidence: *AV Joseph v Shew Bux* AIR 1918 PC 149; see also *Gor Lum Hpaw v Camillo Camilatos* (1919-20) LBR 15 (claim for compensation for unpaid brokerage).

(b) Losses which are caused by the breach but which are not recoverable because they are unexpected or unnatural

The first paragraph of Section 73 requires the loss, caused by the breach of contract to be *either* loss which naturally arose in the ordinary course of things, *or* loss which the parties knew, when they made the contract, to be likely to result from the breach.

Sometimes a loss, which is caused by the breach, does not arise naturally or in the ordinary course of things. Suppose I make a contract with a driver that he will collect me at 5 pm from outside my office in Merchant Street, where I will be waiting on the pavement's edge. The driver is late, and, while I am waiting for him to arrive, a passing car swerves out of control and crashes into me. I may suffer both loss and damage, and if my driver had not been so late, I would not have suffered at all. But in this case the loss and damage did not arise naturally or in the ordinary course of things; and it was not something which, when we made the contract, the driver knew was likely to occur if he breached the contract by being late. It was an unnatural, unusual, event, and it will not form part of the compensation for which I can make a claim against my driver.

(c) Profits lost because of the breach which may be recoverable if the defendant knew they were likely to result from the breach

Now suppose that I am a printer, and that my printing machine needs a repair to a certain part. Suppose I tell the repairer, who agrees to complete the work by Friday, that if he does not get it back to me in time, I will not be able to resume work and will lose business. If the repair is unjustifiably delayed I lose business and, as Illustration (i) to Section 73 says, I can claim compensation from the repairer for the average amount of profit which I would have made if the repair had been carried out on time but could not make because of the late repair. If by contrast the business I lost was an especially lucrative contract with the government, I will not be able to include that in my claim for compensation, as that was not a loss which arose in the ordinary course of things, or a loss which the repairer knew was likely to occur. It is not enough to say that the party in breach knew perfectly well that there would be a loss of profits; it appears to be necessary to say that the particular loss was one which the party in breach of contract knew was likely to occur if the contract was broken.

Likewise, if I engage a builder to work on my house which I am going to open as a bed and breakfast business on October 1st, and the builder knows that this is so, if he fails to complete the work by the agreed deadline, he will know that I will lose business, and he will be liable to pay compensation in respect of this. But if I had a booking from a group of NGO officials who had agreed to pay well above my advertised rate, he will not be liable to pay damages in respect of this enhanced sum unless he knew the details of the specific contract lost. If it should be objected that this is rather harsh on the builder, the proper response is that if he is not so liable unless he knew of the prospective loss when the contract was made, he could and should have made sure that he contracted on terms which excluded or limited his liability for

losses for which he did not wish to be responsible: that is how he knows what he is and is not exposed to.

(d) Losses resulting from lost contracts of resale

The same principle can be seen to apply in cases in which the failure to deliver goods sold on time, or to perform services on time, results in the purchaser or service-recipient losing a profit or gain which would have been made if the seller or service provider had not broken the contract.

Suppose I am a farmer who makes a contract to sell rice to a merchant who, as I know, will sell the rice on and make profits on the resale. I know, if I think about it, that if I breach my contract and do not deliver the rice, the merchant will have to go to market to buy replacement rice; and if he has to pay more than he was going to pay me, the loss is one which naturally arose in the ordinary course of things: either way, Section 73 says that I must pay the difference. I will not have to pay compensation for the lost resale, provided, as is very likely, that the merchant will be able to go to market to obtain alternative supplies with which to fulfil his contract.

If a buyer tells the person from whom he contracts to buy a commodity – Illustration (j)²² to Section 73 uses iron – that he is buying it for the purpose of selling it on, then if the iron is not delivered, the seller must pay compensation for the profit which the buyer will not now make. It is easy to see that this is lost, and that the seller knew that this loss was likely to occur if he were to breach the contract.

By contrast, if the fact that the buyer had a particular purpose in mind for the commodity which the seller contracted to sell and deliver to her was not known to the seller, she will not be able to claim compensation for the profit lost. This appears to be the explanation of Illustration (q) to Section 73. If a seller fails to deliver on the agreed date cloth which the buyer was going to use to manufacture a particular garment which has to be made on a certain day, such as a wedding dress for a client, with the consequence that the buyer loses the profit she would have made, the seller is not liable to compensate the buyer for this loss. The reason appears to be that the seller had no cause to suppose that being a few days late in delivering cloth would have so dramatic an effect on the buyer: being a little late with the delivery of a commodity which is not perishable does not usually have a major impact on the buyer. That being so, the loss caused by that breach will not have been in the contemplation of the seller as likely to occur, and compensation for it is accordingly not available. Illustration (j) indicates that the answer would be different if the seller had been told, when the contract was made, how and why the date of delivery was so important. Illustration (k) makes the same point. If the buyer becomes liable to pay compensation to the person to whom he had contracted to sell on the article purchased from the seller, or to the person to whom he had contracted to deliver the items to be manufactured by him using the commodity delivered late by the seller, he will not be able to recover compensation in respect of this loss unless the seller had been told

²² Applied directly in *Byan Na v Maung Cheik* AIR 1917 LB 161.

of the existence of this consequential contract and of the consequences which would result if it were broken as a result of the seller's breach.

In summary, all these cases require the court to ask whether the party who has broken his contractual promise knew what the loss would be likely to be, if the contract were breached in a particular way. Only if the court is satisfied that that party did know of the likelihood of the losses which result from the breach²³ will it be possible to recover compensation in respect of this particular loss.

Finally, let us return to the buyer of cloth, and demonstrate the connection between this aspect of the law and the principle of mitigation which was discussed above. Let us assume that the buyer does go into the market to obtain alternative supplies. Section 73 also allows her to be compensated for the means by which she remedied the inconvenience resulting from the non-delivery. But if she could have done, but did not do, that, the losses which result may²⁴ be said to have been caused by her and not by the seller. If that is so, the consequences of that failure are not the seller's responsibility;²⁵ they are losses caused not by the breach but by the failure of the buyer to act reasonably and promptly.²⁶

(e) A more difficult case: the taxi driver

It should be noted that the second paragraph of Section 73 repeats concisely the effect of the first paragraph of Section 73 by saying that: 'compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach'. The examples which have been discussed above seek to show what this means in practice.

Let us now take another case in which the losses may be caused, and were well understood to be likely to occur, and which I could have done nothing to avoid. Suppose I engage a driver to drive me to the airport, and in breach of his contract to do so he fails to get me there on time. As a result, I miss my flight to Singapore, and have to buy a ticket for another flight, which costs me \$200. This loss would not have happened if the contract had not been breached: can I recover this sum from the driver?

He will argue that I cannot recover this sum as compensation for the breach. He will argue that he contracted to get me to the airport, not to Singapore, and he should not have to pay the cost of getting me to Singapore. He may also argue that I did not tell him of my flight details, and that he did not know that this expense

²³ See for example Illustration (l) to Section 73. It is not clear that this is easy to reconcile with Illustration (m) to Section 73, but if the seller in that case did know of the intended resale, the claim for compensation seems to be justified.

²⁴ *Ma Hnin Yi v Chew Whee Shein* AIR 1925 Ran 261 suggests that though the duty to mitigate lies on the plaintiff, the burden of showing that the plaintiff did not do what he should reasonably have done lies heavily on the defendant. But it will always be a very fact-specific and case-specific enquiry, from which only very general principles can be derived; see also *Eng Ban Hwat & Co v Latiff Hazi Shariff Hajee Noor Mahomed* AIR 1927 Ran 81.

²⁵ *AKAS Jamal v Moolla Dawood & Sons* (1915) 43 Ind App 6, AIR 1915 PC 48, [1916] 1 AC 175; *Maung Gat Chaw v Daw Shwe Hman* (1961) BLR 21 (HC).

²⁶ *Maung Gat Chaw v Daw Shwe Hman* (1961) BLR 21 (HC).

would be likely to be the result of the breach. However, perhaps he did not need to be told: a taxi-driver who agrees to drive me and my luggage to the airport knows very well that I am going to the airport to catch a flight and that if I miss my flight I would need to buy another ticket. Why, then, should he not be liable for the loss which I have incurred?

It would appear that the answer to this is that that loss cannot be recovered. It is helpful to refer to Illustration (r) to Section 73. This deals with a delayed sea passage from Yangon to Sydney, where the consequence of the delay is that I arrive in Sydney too late to receive a sum of money which was to be paid to me if I arrived on time: I may be able to recover costs incurred by the delay, but I am not able to claim damages in respect of the sum of money which I am too late to receive. Why is this? We might say that the loss of the money in Sydney was not the loss of the performance for which I paid the carrier, because the carrier did not promise to get me to Sydney to claim the benefit which was waiting for me there. He promised to get me to Sydney; and the benefit which was waiting or not waiting in Sydney was no part of the contract. We might say that what happened in Sydney was not caused by the carrier: if the reason for the delay was stormy weather, any ship travelling from Yangon to Sydney would have been delayed, and this carrier did not cause the bad weather. We might say that the loss of the benefit in Sydney did not arise in the usual course of things, or that it was a remote and indirect loss sustained by reason of the breach. But whichever it is, it appears that it is not a recoverable loss.

(f) The meaning of compensation for financial loss and the restrictions on recovery

In some other common law systems, the notion of compensation for financial loss has been stretched so that, for example, damages for breach of contract can sometimes be awarded based on the price which the plaintiff could reasonably have charged the defendant for releasing the defendant from the obligation that has been broken had the defendant approached the defendant immediately before committing the breach.²⁷ There is no indication of such an extension of the meaning of compensation for loss in Myanmar. In other respects, Section 73 mirrors the law in other common law systems in imposing restrictions such as remoteness, causation and mitigation on the recovery of compensation. This may be thought to encourage people to make contracts (their liability if things go wrong is not excessively extensive). It also encourages plaintiffs, who suffer a breach of contract, to act efficiently, and not to sit back and then try to hold the defendant responsible for all the adverse financial consequences of the breach.

²⁷ In English law, these damages are commonly referred to as 'Wrotham Park damages' after the leading case of *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798. Although normally rationalised as compensating for a type of loss (for example, loss of the opportunity to bargain) they are also sometimes regarded as a form of restitution stripping the defendant of some of the gains made by breach. Note also that in English law it was accepted in *Attorney-General v Blake* [2001] 1 AC 268 that exceptionally an 'account of profits' can be awarded stripping all of a contract-breaker's net profits made from the breach of contract. See also Chapter 10.10, below.

The truth is that in all legal systems, much work and much thinking is needed to decide which unwelcome consequences of a breach of contract, are to be made the responsibility of the defendant who is in breach of contract, and which are to be regarded as regrettable but not the financial responsibility of the defendant. In this respect, Myanmar law is just as difficult to apply as is the law in other common law systems, because the number and variety of contracts, and circumstances of contracts, to which the compensation rules must be applied, are so vast.

8.8 Contractual agreement on the sum recoverable: liquidated and limited damages

Section 73, and the Illustrations and reasoning of the courts which explain how it works, deals with the principal grounds on which compensation may be awarded to the plaintiff against a defendant who has failed to fulfil the obligations of a contract. The next question is whether the parties, when making a contract, may include a term which defines, limits, or restricts the compensation which a court may be asked to award when there is a breach of contract. In principle the answer is yes. Section 74 provides, in material part, as follows:

74. Compensation for breach of contract where penalty stipulated for. When a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach... the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named...

There is a strong reason why contractual terms of this kind should be given effect in law. Parties who make contracts, and who are aware of the financial risks which they run if there is a breach of contract, may wish to know in advance, or limit, or both, their exposure to claims for damages. Being able to do so may allow them to contract at a price which their customers can afford; but if their liability to pay compensation were to be unlimited, except by Section 73, it would make it more risky to enter into contracts, or risky to do so at an affordable price. In large commercial contracts, especially, the contracting parties may be unwilling to allow liability to pay compensation to be open-ended. They may therefore include a term in the contract which defines, and which may limit, the compensation claimable or payable in the event of a breach of contract. And they will expect the courts to enforce it.

Section 74 certainly does suggest that if the parties have named a sum in the contract as the amount to be paid in the event of a breach, that sum may be recovered, whether or not there is any actual loss or damage, so long as the sum recovered does not exceed what reasonable compensation would amount to. But this in turn suggests that Section 74 is designed for terms in contracts which provide for a sum to be paid which is more than the actual loss or damage. It does not appear that Section 74 was designed for agreements by which parties state a figure which is likely to be lower than the figure for reasonable compensation might be. Despite this, a court may well consider that Section 74 requires it to give effect to a term by which the parties have

agreed that the sum to be paid by way of compensation should be less than the actual loss may prove to be.

This opens the door to a separate problem. For if it is possible for the parties to agree upon a figure for compensation in the event of breach, it is also possible for one of the contracting parties to take unfair advantage of its more powerful economic position, and to impose on the other party, who may have little practical choice but to agree to it, a drastic limitation on the compensation which can be claimed. Suppose an employer, or a provider of services, or a lawyer, or a bank, drafts a contract, to be signed by an employee or client, or customer, which states that in the event of a breach of contract by the employer, bank, et cetera, the amount of compensation is limited to 1000 kyats, no matter how enormous the actual loss or damage. Would a court simply accept that, if this is what the parties have agreed to, it must be accepted and enforced?

In almost all other countries of the common law world, it has been found necessary to amend the law to give a court power to protect a weak party from the unfair exercise of contractual power by a strong party. It would appear that this cannot be done under Section 19A because, even if one were to strain the meaning of 'undue influence', no-one is trying to set aside or rescind the whole contract; the objection in this case is to one particular term. We considered one aspect of this problem in Chapter 5 when we were looking in particular at terms excluding liability. Here the same problem arises in the context of terms limiting liability.

In response to a question we posed, lawyers in various kinds of legal practice in Myanmar expressed the view that they would expect a court to enforce a contract term of this kind – that is to say, a term limiting liability – no matter how unfair it appeared to be. This, of course, does not establish what the law is, though it is certainly evidence of the prevailing legal assumptions, and it is therefore instructive as guidance.

Nevertheless, it appears that if the courts were to wish to deprive such a term of legal effect, there are means by which they could do so. We saw in Chapter 5 that, although there is nothing in the Act that obviously allows this, the courts might consider that 'justice, equity and good conscience'²⁸ offers them a route to control unfair terms of this kind. In the context of terms limiting liability, one might also perhaps argue that, because the normal measure of damages is laid down in the Contract Act, the Act itself can be interpreted to prevent terms limiting damages. For example, one might argue that the waiver of the entitlement to damages under Section 73 is in such circumstances contrary to public policy and therefore void.²⁹ There is no authority which directly points to, still less compels a court to reach, this conclusion, but it is hard to see why the point could not be argued today.³⁰

One might also argue, for example, that if a court under Section 74 may reduce the sum awarded to a reasonable figure below that which was agreed to, it would be

²⁸ Burma Laws Act 1898, Section 13(3), which was set out in Chapter 1.2(ix), above.

²⁹ By reference to Section 24: see above, Chapter 3.6, above. There is admittedly no support in *Daw Mya Swe v The Union of Burma Airways* (1964) BLR 279 (CC) for this suggestion.

³⁰ The argument would face the difficulty that the public policy provision in Section 24 is expressed to operate when 'the object of the agreement', as distinct from 'the object of one term of the agreement' is contrary to public policy. It does not appear that the difficulty would be insuperable, but it cannot be ignored.

surprising if it had no power to increase the sum awarded as compensation to above the figure agreed. In other words, if a penalty clause will only be enforced in a limited way – whatever the clause says, the court will not order more than reasonable compensation – it would be inconsistent to enforce an unreasonable limitation clause. One may put it another way still. Section 74 protects a party who is in breach of contract from having to pay more than is reasonable. Why would the law wish to protect a party who has committed a breach of contract but not assist a party who has committed no breach? What would be the point of that? It would make sense, as a matter of legal policy, for a court to decide that a provision in a contract, limiting damages, cannot be given effect where it would limit compensation to a figure below what it is reasonable for the innocent party to recover. But at the moment it is not at all clear whether this is a possible, still less the correct, interpretation of the Contract Act.

8.9 The role of penalty clauses

And so we come to the law on penalty clauses. It is set out in Section 74, which in its full form provides as follows:

74. Compensation for breach of contract where penalty stipulated for. When a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation. A stipulation for an increased rate of interest from the date of default may be a stipulation by way of penalty.

Exception... (omitted)

A contract may contain a term which specifies the damages which will be recoverable in the event of breach. If that is a reasonable estimate of loss, we call it liquidated damages. But where it appears to be rather larger than the reasonable estimate of loss, it may be a penalty. Where a penalty clause takes the form of a term which provides for a payment of money, in circumstances in which this may well be in excess of the sums which a court would award as compensation under Section 73, it is easy enough to identify it as a penalty. The principle applies just as much to a provision which reduces the purchase price if the seller fails to deliver on the due date: such a term is functionally identical to a penalty payment.³¹

A contract term may be assessed as a penalty when an interest rate is liable to be raised sharply if there is a breach of the duty to repay,³² for example, but this will

³¹ *U Htan Hmat v Daw Gon* (1957) BLR 73 (HC).

³² See for example Illustration (d) to Section 74, where the increase in interest rate is from 12% to 75%, which is a stipulation by way of penalty.

naturally depend on the actual figures;³³ and a clause providing for the forfeiture of a two-thirds pre-payment if the final one-third is not paid is a penalty.³⁴

But not every unwelcome term which comes into effect in the event of a breach of contract will be seen as a penalty.³⁵ For example, an accelerated payment provision, where the entire loan is repayable if there is a failure to pay a single instalment, is not a penalty.³⁶ A provision agreeing compensation which will be paid if a contract is not performed will not be a penalty,³⁷ at least if the figures seem sensible. A forfeiture provision in a pledge agreement is a normal incident of a pledge, and is not generally³⁸ in the nature of a penalty;³⁹ and it has been similarly held that a contractual right to forfeit a deposit by way of security is not a penalty,⁴⁰ even if it does put pressure on a party not to breach the contract. In one case, a term providing for goods to be repossessed when a contract of hire purchase was breached very close to the end of the period of hire was found to be a penalty;⁴¹ though an earlier decision had been to contrary effect,⁴² and a later case criticised the decision in strong terms.⁴³ And this may be the general point to be taken from the cases. It is not enough that the term puts economic pressure on a party to perform her obligations by making it unattractive, or maybe very unattractive, to fail to perform. To be considered as a penalty, the clause has to go further than that: it has to do so in a way which strikes the court not as encouraging performance but as punishing non-performance.

It appears that the use of contractual penalties is more common in Myanmar than in other countries of the common law world. In many other countries the objection to penalties is that it is not the function of the civil law to punish people: that is the task of the criminal law, and breach of contract is not a crime. Moreover, there is something slightly shocking in the idea that a plaintiff, who is entitled to compensation in accordance with Section 73, should ever expect to receive any more than that

³³ *Deramall v Nga Saung* (1909) UBR 17 (even more obviously a penalty where the sharply increased rate of interest was backdated to the date of the original borrowing); contrast with *PC Pal v KALR Firm* (1923) ILR 1 Ran 460, AIR 1924 Ran 46 (only small increase in rate from date of breach not a penalty). A variable rate of interest, which gives a discount for early repayment, is not a penalty: *Administrator-General of Burma v ME Moolla* AIR 1928 Ran 19.

³⁴ *U Ba Hla v Ko Han Tun* (1951) BLR 251 (SC) (the case was argued *ex parte*, and the reasoning is sparse).

³⁵ *Maung Law Phy v Ma Baw* AIR 1933 Ran 198 (obligation to pay twice the value of wedding presents received if contract to marry broken: penalty); *C Soon Thin v Mg Than Gweye* AIR 1934 Ran 346 (obligation to pay fee plus 50% of net recovery from litigation: extortionate and treated as a stipulation by way of penalty even though it was not a sum payable on breach of contract).

³⁶ *Ko Kyan Swe v U Ba* AIR 1935 Ran 341 (and see Illustration (f) to Section 74).

³⁷ *AKRMMK Chidambaram Chettyar v Khoo Hwa Lam* (1950) BLR 98 (SC).

³⁸ There is a faint suggestion in *Dwarika v Bagawati* AIR 1939 Ran 413 that if the value of the property given in pledge is greatly in excess of the outstanding debt, it might be otherwise.

³⁹ *Dwarika v Bagawati* AIR 1939 Ran 413.

⁴⁰ *DK Parekh v The Burma Sugar Co Ltd* (1948) BLR 257 (HC). It is not clear whether this is affected by *U Ba Hla v Ko Han Tun* (1951) BLR 251 (SC), but in the latter case the forfeiture was of a large part of the purchase price, a much larger sum than a deposit usually is.

⁴¹ *Maung Ba Oh v Motor House Co Ltd* AIR 1929 Ran 368, (1929) ILR 7 Ran 431.

⁴² *Singer Sewing Machine Co v Maung Tin* AIR 1923 Ran 47.

⁴³ *Abdul Quadeer v Watson & Sons* AIR 1930 Ran 193, (1930) ILR 8 Ran 236.

sum. For this reason, the law in many other countries of the common law world has restricted, or even eliminated, penalty clauses as contractual terms which a court will enforce. One may then ask why things are so different in Myanmar.

The answer is that although Section 74 appears to say that a penalty clause can be enforced, it also says that it cannot be enforced above the level of reasonable compensation. Although the parties may have agreed that a sum will be paid in the event of breach, the court will only award reasonable compensation, which may not exceed the so-called penalty,⁴⁴ and which may be very much less.⁴⁵ This is a mature and sensible approach to a problem. The law cannot allow parties to stipulate for immense financial payments which would ruin a party in the event of breach; for those familiar with Shakespeare's play *The Merchant of Venice*, we cannot expect a court in a common law jurisdiction to enforce a contractual term which allows a money-lender to cut a pound of flesh from the body of the borrower if the borrower fails to repay on the date stipulated in the contract. Myanmar law allows the parties to include penalty clauses if they wish to. It just does not enforce them in a mechanical way. They are enforced but only to the extent of requiring reasonable compensation to be paid.

One may therefore ask whether there is any real purpose in using a penalty clause. For if the court will only ever allow reasonable compensation, is not the effect of Section 74 that compensation in accordance with Section 73 is all one ever recovers? The answer is not clear, but it may be that 'reasonable compensation' for the purposes of Section 74, may be a larger figure than the compensation for loss or damage which would be allowed by Section 73. We have seen that there are some limitations built into Section 73 which mean that there may have been a loss, but no compensation is given in relation to it, perhaps because it is held that it was not caused by the breach, or perhaps because it would be considered to be too remote to be recoverable. It is possible that 'reasonable compensation' referred to in Section 74 would amount to more than would be assessed as damages under Section 73.

And some – not, by any means, all – of the cases teach us something else. In some⁴⁶ cases, the courts were prepared to hold terms to be penalties: not in order to enforce them, but to allow the court to exercise the power in Section 74 to limit the effect of the term.⁴⁷ What this seems to show is the court being prepared to accept that a term of a contract is a penalty precisely in order to be able to moderate or limit its effect. One would never realise that just from looking at the text of the Section.

⁴⁴ *Ma Si v Ma Tha Ya* (1892-96) UBR 290; *Ma Pan v Maung Kan Bu* (1892-96) UBR 300; *Kala Singh v Maung Po Thauung* (1897-1901) UBR 333; *Maung Tha v Shwe Zan* AIR 1915 LB 148; *U Tin Aung v U Tin Ohn* (1964) BLR 242 (CC).

⁴⁵ *U Htan Hmat v Daw Gon* (1957) BLR 73 (HC).

⁴⁶ But certainly not all: the decision that it was possible to give equitable relief in *Maung Ba Oh v Motor House Co Ltd* AIR 1929 Ran 368, (1929) ILR 7 Ran 431 (seizure provision in hire purchase agreement: penal) was criticised in strong terms in *Abdul Quadeer v Watson & Sons* AIR 1930 Ran 193, (1930) ILR 8 Ran 236 (seizure provision in hire purchase agreement not considered penal at all).

⁴⁷ For example, *Maung Ba Oh v Motor House Co Ltd* AIR 1929 Ran 368, (1929) ILR 7 Ran 431 (seizure provision in hire purchase agreement).

8.10 Compensation in respect of non-pecuniary damage

We have already mentioned that if a breach of contract – say the driver drives recklessly and injures his passenger – causes non-pecuniary damage, such as a broken arm, compensation may be claimed, but the assessment of the proper amount will be more difficult. But a different problem arises when one of the effects of the breach of contract is that the other party is made to suffer annoyance, or humiliation, or anger, or distress. For example, if I make a contract with a restaurant by which it will serve an excellent meal to someone who is important to me, but the restaurant makes a terrible job of it, it is not clear that I suffer much pecuniary loss: after all, I did expect to pay the money which I paid. But I may well suffer humiliation, loss of face, anger, and distress at the bad impression which the breach of contract by the restaurant has caused to me. Can I claim compensation for this?

(a) Contracts in general; traditional answer

The answer given to the question by the Contract Act⁴⁸ is probably not. Illustration (n) states that:

‘A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.’

On the assumption that becoming ‘totally ruined’ was a distressing experience for B, B might have hoped that this extreme distress, which would not have happened if the contract had not been broken, would be seen as damage for which compensation was payable. But the Illustration indicates that it is not. One reason may be that this kind of thing is regarded as ‘remote and indirect loss or damage sustained by reason of the breach’, and that as a result it is excluded from compensation by the second paragraph of Section 73. There is some justification for this: the distress which results from the breach is not the *direct* effect of the breach – that was the financial loss of the expected payment – but an indirect consequence. Or maybe the answer is not so technical: the law of contract just requires people to cope with their disappointment and anxiety, distress and loss of face: in short, to get over it. Because if it did not, most plaintiffs would be able to claim that the breach of contract had caused them distress, and every case would become more expensive. In some circumstances this may appear to be harsh and unkind, but the law of contract is commercial, and commerce is concerned with money and reputation, not with feelings and self-esteem. Perhaps the plaintiff is simply expected to show a bit of strength.

⁴⁸ And by *Ma Ngwe Yin v Maung Po Taw* AIR 1914 LB 204 (no damages for breach of contract (of marriage) leaving plaintiff to suffer ridicule or with feelings of humiliation).

(b) Contracts made for the primary purpose of pleasure or relief from distress: an exception?

Despite what has been said above, there are certain kinds of contract for which the answer just given does not seem sufficient. There are certain contracts whose main, or entire, purpose is to deliver pleasure, or relief from anxiety, to the plaintiff. If such a contract is breached, the plaintiff will suffer misery or distress. There may be little or no financial loss in such a case, but if the law will not award compensation for the unhappy failure, the contract-breaker will be free of liability, and that does not appear to be desirable.

For example, if I instruct my lawyer to take legal proceedings to prevent my being harassed by my former spouse, or by a newspaper reporter, but he fails to do what he contracted to do with an appropriate degree of skill, so that the harassment continues, I may not suffer economic loss, but I will suffer distress and anxiety. If I make a contract with a holiday company to provide me and my family with a luxurious holiday, but the company utterly fails to deliver the quality of holiday which it promised, I may not suffer financial loss, but I will certainly suffer distress. And if I pay a company to provide security for my house while I am away, but the company fails to do what it promised to do, I may not suffer monetary loss, but I may well suffer stress and great anxiety. It is hard to believe in such cases that Section 73 will not allow substantial damages to be recovered.

The reasons for allowing recovery in such cases are pragmatic: it does not seem right that the other party can undertake contractual obligations, receive payment, fail to perform its obligations, bring about the very opposite of what the contract had been entered to achieve, and yet face no liability. It will do nothing to encourage defendants to perform their contracts; it will mean that plaintiffs who receive none of what they contracted for will go uncompensated. Some may think that it is better, in such a case, that compensation should be paid, even though this will extend the scope of Section 73 beyond what has previously been acknowledged. Others will say that there is real difficulty in drawing a clear line around the contracts to which this principle will apply. If the law is to allow such compensation, the matter must be treated as one of principle. The key to any such development of the law will be to distinguish between two kinds of contract. On the one hand are contracts such as employment, or the purchase of a new washing machine, which are not made primarily for pleasure but which are liable to lead to distress if the other party commits breach. In such cases, no compensation will be awarded for misery consequent on breach, because the unhappiness is, in the language of Section 73, an indirect form of loss or damage. On the other hand one may consider contracts whose primary purpose is pleasurable gratification or the alleviation of distress. In these cases, the failure to deliver relief or pleasurable gratification to the plaintiff is a failure to deliver the very thing contracted for, and the unhappiness is not an indirect, but a very direct, consequence of the breach. That seems to be a workable rule which would accord with the basic approach set out in Section 73.

9

Remedies for Breach of Contract (3): Specific Performance and Injunctions

Remedies for breach of contract which, leaving aside the award of an agreed sum, order a party to do or not to do what it contracted to do or not to do

Leaving aside suits for the price or for similar agreed sums, the most usual remedy for a breach of contract is monetary compensation in the form of damages. The common law has always supposed that the best thing to do is to order the party in breach to make an appropriate payment to the other, and to let the parties then go about their business: a 'clean break' principle. If there has been a breach of contract and one party has taken the other to court, there is likely to be a degree of mistrust or ill-feeling which suggests that the best thing to do is to allow the parties to go their separate ways, with the compensation which the law provides for.

Indeed, there are some modern theories of contract law which argue that it is actually a good or efficient thing for a party to break his contract and the law to provide for proper compensation. If a seller of goods who has agreed to sell them to A for \$100 is offered \$150 for them by B, and he decides to break his contract with A (but to pay compensation to A) so as to be able to sell them to B for \$150, the result is that A does not have the goods but has proper compensation, B has the goods he really wanted, and the seller has \$50 more than he was expecting to have. Some will say that this is an 'economically efficient' result, a result by which everyone is a winner. Others will think that it is morally dubious, for it gives a party who has made a promise and contract an incentive to break them, and that is hardly satisfactory.

However, a suit to recover compensation for breach of contract in accordance with Sections 73 to 75 is not the only remedy available to the party not in breach. In this chapter we examine two significant, alternative, *discretionary*,¹ judicial remedies provided for in the Specific Relief Act 1877, specific performance and injunctions.

We do not in this chapter deal with claims to obtain payment of the price, fee, or other sum which had been agreed to be paid by the buyer, client, customer: it was dealt with in Chapter 8, and it would not belong here. Although it may be argued that a claim to obtain payment of an agreed fee is brought under that Act as a claim for specific performance of the contractual promise to pay,² in our opinion this is not

¹ See Specific Relief Act, Section 22, which is set out below.

² See Specific Relief Act, Section 13, Illustrations.

the correct analysis of such claims. The claim for payment of the price, fee, or analogous sum is a claim to enforce a debt which the buyer, client or customer agreed to pay and (if the conditions for payment have been satisfied) should now be ordered to pay. There should be no question of the plaintiff needing to ask the court to exercise a discretionary power; the right to payment of the price is a right.³

We do not deal in this Chapter with other forms of relief available under the Specific Relief Act, even though these may be relevant to the parties to a contract. The Act provides for a court to order the delivery up of property,⁴ to rectify written documents,⁵ to rescind (formally) a contract,⁶ to cancel instruments,⁷ and to make declarations of legal rights.⁸ Insofar as these have not been discussed elsewhere, they are peripheral to the main concern of this book.

The fact that this Chapter is not even half the length of the others, and is much shorter than the one on compensation for breach, reflects the fact that these are relatively minor alternatives to the main remedies for breach of contract which we have already discussed. The two remedies or reliefs with which we are concerned are dealt with in the Specific Relief Act 1877, and they are these:

1. Decrees of specific performance;
2. Injunctions to restrain commission of a breach.

9.1 Decrees of specific performance

Each party to a contract is entitled to expect the other to perform. When a party fails or refuses to perform, or indicates that he will refuse to perform, the other party may apply to the court for a decree of specific performance so that the party in breach or who is proposing to break the contract may be ordered by decree to perform his contractual promise. The basic rule is stated in Specific Relief Act, Section 12:

12. Cases in which specific performance enforceable. Except as otherwise provided by this Chapter, the specific performance of any contract may in the discretion of the Court be enforced –

- (a) when the act agreed to be done is in the performance, wholly or partly of a trust;
- (b) when there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done;
- (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or
- (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

³ In the context of the sale of goods, a suit for the price in accordance with Sale of Goods Act s 55 plainly involves the enforcement of a right, and does not involve the exercise of a judicial discretion.

⁴ Specific Relief Act, sections 8-11.

⁵ Specific Relief Act, sections 31-34, which was discussed above, Chapter 5.3.

⁶ Specific Relief Act, sections 35-38. This means, in effect, to provide judicial confirmation that a contract has been, or was entitled to be, rescinded. It therefore adds little to the law on rescission which has been examined at length in earlier chapters especially Chapter 4.

⁷ Specific Relief Act, sections 39-41.

⁸ Specific Relief Act, sections 42-43.

Explanation: - Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

The first thing to say is that in most cases a decree of specific performance would be a deeply unattractive remedy. It will take a long time to institute a suit for specific performance, and even longer to get a judgment (followed, perhaps, by an appeal). By the time the decree is issued it may be far too late for the contract to be specifically performed: a contract to deliver a quantity of perishable foodstuff, for example, will not be one for which specific performance is the obvious remedy. Unless the court can entertain an urgent application and make an appropriate interim order, specific performance will often be far, far too late to be any use at all.

The second thing to say is that the details of the law of specific performance are, however, reasonably intricate; and a significant part of the Act dealing with specific performance is concerned with contracts dealing with interests in land, which it is not expedient to examine in the context of a book on general contract law. So although the basic rule is that the court has a discretion to order specific performance - but has no obligation to order specific performance - if compensation under Section 73 of the Contract Act would be inadequate or insufficient as a response to the loss caused by the breach of contract, Sections 13 to 30 of the Specific Relief Act mean that the law is rather more detailed and complex than that basic rule might suggest. For these reasons we will give a summary, rather than a detailed, exposition of the law on specific performance of contracts.

(a) Pecuniary compensation an inadequate response to the breach

Specific performance may be ordered where a fixed, lump sum of damages would not be an appropriate response to the breach. This may be because the contractual obligation was the repeated payment of sums of money, say every year till death: it would make no sense to require a suit for the payment to be brought every year, and it would be impossible to quantify a single figure as the total recoverable in damages. It may be because there are other reasons – the unique and irreplaceable nature of the property, for example – which mean that an award of damages is not a sufficient response to the breach.

The sensible place to start is with Section 12(c). Suppose, in order to provide myself with an income for the remaining years of my life I make a contract with an insurance company under the terms of which it will make monthly payments to me for the rest of my life; and suppose that after a period of time it stops doing so. If I sue for compensation for the breach, the assessment of compensation will be impossible, for it is not possible to know how many months I will live, and therefore how much loss results when the company breaks its contract. In such a case, a decree of specific performance fits the needs of the case perfectly: if the company is ordered to make the payments it agreed to make, the contract will be performed precisely according to its terms. The case will fall within Section 12(c), for any attempt to assess a lump sum for compensation will fail to get the right number, and it will

therefore be an inadequate - too high or too low - response to the breach. A court may - it has a discretion - order specific performance; it should do so.

So also if I make a contract to buy shares in a private company. If I pay the money but the shares are not transferred, the loss may be impossible to calculate, for if the shares are not listed on the open market, it may be very difficult to put a value on them. If they cannot be valued, an award of compensation will not adequately reflect the loss caused by the failure to transfer them.

By contrast, if I make a contract for the purchase of a quantity of rice, and the seller fails to deliver, an order that damages be paid by way of compensation is adequate for I can use the damages to go into the market and buy other rice, and a decree will not be made (the point is underlined by Section 21 (a), mentioned below). The basis for the difference with the share sale is that if there is a ready market, compensation is easy to calculate; if there is not, it is not.

The Explanation to Section 12 establishes that a contract for the sale of land will usually fall within Section 12(c) and will be a contract which the court will decree for specific performance.⁹ The basis for this is that all land is unique, and it is not sensible to say that if the buyer is given financial compensation he can go into the market and buy equivalent land. That certainly was the traditional position; and even though more contracts for the sale of land are now actually contracts for the sale of (or sale of the lease of) an apartment in a large block, the court is still likely to say that, if a buyer wishes to have his contract decreed for specific performance, the order will be made. It is not for the seller to tell the buyer that there are plenty of identical flats, and that damages will be sufficient for him. They may not seem identical when looked at from the buyer's point of view. In any event, the traditional view of the uniqueness of land has given a degree of welcome certainty to the law so that it is unlikely that a court would refuse specific performance to a buyer who applies for it. Indeed, even the buyer's obligation under a contract for the sale of land is generally regarded as specifically enforceable.¹⁰

The other grounds given by Section 12 are based on similar concerns; there is no doubt that they overlap. If I have paid a painter to paint a portrait of my father, and the painter then refuses to hand over the painting, Section 12(b) will justify a suit for specific performance. The case does not fall quite so easily within Section 12(c), for the real question is not one of measuring my financial loss, or of how much it would cost to commission another artist. The loss which I suffer by the refusal to hand over the painting is not a matter of money. Rather it is non-financial loss which is always difficult to assess and it is best that the courts avoid having to pluck a figure out of the air. A decree of specific performance avoids them having to do so.

In summary, the general principle is that the court should try to determine the sum it would order to be paid by way of compensation under Section 73. It should then ask whether that would be adequate to compensate the plaintiff for her loss.¹¹ If it is not, the conditions of Section 12 will have been met, and the contract will be

⁹ *PS Moideen Baba v RMP Chettyar Firm* AIR 1934 Ran 160.

¹⁰ This explains the Illustration to Section 13 (a buyer who has not paid the purchase price for a house which was destroyed by a cyclone after the contract was made may be ordered to pay the agreed price).

¹¹ *Abdul Rahim v Ma Budima* AIR 1933 Ran 149.

one which the court has discretion to enforce by decree of specific performance. But it is to be remembered that, just because the contract appears to fall within Section 12, all that this means is that the door to a suit for specific performance is opened. It certainly does not mean that the court will consider itself bound to make the order.

(b) The relevance of events occurring after formation of the contract

Sometimes a court considering whether to make a decree of specific performance will observe that a decree will not, perfectly and in every detail, put the parties in the position which the contract stipulated. Some cases are easy: if the property to be bought and sold has been slightly damaged since the contract was made, with the result that the buyer would not receive the property in exactly the condition it was, Section 13 provides that the court may still decree specific performance. However, the Illustrations to that Section go rather further than that, and indicate that court may still order specific performance of a contract for the sale and purchase of a house even though the house has been severely damaged by a cyclone, or decree payment of the sum agreed for an annuity even though the person to whom the annuity was to be paid died very soon after the contract was made (with the result that the contract in each case has proved to be a very poor bargain). Unless performance of the obligation has become wholly impossible, in which case Section 56 of the Contract Act will apply, it seems that Section 13 means that the court should not allow a defendant to resist a decree by pointing to acts which occurred after the contract was made and which now mean that he would prefer not to have to perform in full his side of the contract.

Though this may seem surprising, the principle on which the rule is based is sound. Every contracting party takes a risk that something will happen after the contract and before performance; and unless Section 56 means that the contract has become void,¹² the contract may still be decreed for specific performance. In the case of the house flattened by the cyclone, the cyclone would still have struck, and the damage done, if the contract had already been performed. The risk that it might do so was on the buyer,¹³ and there is no compelling reason, if the contract is not void by reason of being wholly impossible to perform, to relieve the buyer of his obligation to do what he contracted to do.

(c) Specific performance of part of contract

Section 17 lays down a general rule that a court may not order specific performance of a part of a contract: the basic rule is that the court must decree specific performance of the whole of the contract or not make the decree at all. But there are three exceptions, set out in Sections 14-16, in which this rule would not accord with the justice of the case. The first is where it is not possible for a party to perform the whole of an obligation. Say he contracted to sell a quantity of fruit from his plantation, but the

¹² See above, Chapter 3.9.

¹³ For a similar principle in contracts for the sale of goods, see Sale of Goods Act, s 26.

plantation has produced only 90% of the full amount contracted to be sold. Section 14 means that he can be ordered to specifically perform up to the limit of the harvest which was produced and pay compensation for the shortfall:¹⁴ either party may apply for a decree in this case. Secondly, if the shortfall is more major, say only 35% being produced, the seller is not entitled to a decree of specific performance against the buyer; but Section 15 allows the court to order specific performance of the part which can be performed if the buyer gives up all claim for compensation for the part not delivered. Thirdly, if the contract is severable, Section 16 allows a court to decree specific performance of a part of a contract which is severable from the rest.

(d) The relationship between specific performance and compensation

A party who brings a suit for specific performance is saying, in effect, that it wishes the performance obligations of the contract to be reinforced by the exercise of judicial power. That party is not treating the contract as void, or as rescinded, or anything like that. But if the court refuses to make the decree, whether because it considers it has no power to, or because it declines to exercise its discretion in favour of the plaintiff, it would be convenient for it to be able to order the compensation which is the plaintiff's right; and it is therefore convenient to allow a plaintiff to ask for compensation as part of the suit for specific performance. This important rule is provided by Section 19:

19. Power to award compensation in certain cases. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for the breach of contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation- The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

There would be no sense in requiring a party who wishes to obtain specific performance, but who will ask for compensation if the court refuses to make the decree, to bring a separate claim for compensation. Section 24(c) bars the remedy from being decreed in favour of a person who has already chosen his remedy and obtained satisfaction for the breach; and Section 29 provides that the dismissal of a suit for specific performance serves to bar the plaintiff's right to sue for compensation. It therefore

¹⁴ Cf *U Pan v Maung Pa Tu* AIR 1927 Ran 90.

makes perfect practical sense for the plaintiff to be able, but also encouraged, to seek both forms of relief in one proceeding, and to confirm the jurisdiction of the court to deal with them on that basis.¹⁵

It is obvious that if a court orders specific performance, there may still be loss to the plaintiff. If the defendant should have conveyed a house to me on a certain date, but this does not actually happen until after the court decrees specific performance, maybe several years after the contractual date, the decree goes some way, but not all the way, to put matters right. I will have lost the opportunity to lease or use the land in the meantime, and it makes sense for the court to be able to add an order for compensation so as to remedy the breach more completely.¹⁶ The statement in the statute that compensation shall be assessed in such manner as the court may direct should not be understood to mean that the court may pluck a figure from the air. The purpose of compensation is to compensate for that which has been lost, and the basis of assessment should closely reflect that used under Section 73 of the Contract Act.

Section 20 confirms that specific performance may be sought and ordered even though the contract provides that in the event of breach a specified sum of money shall be paid as liquidated damages and the defendant is willing to pay this sum. This makes sense, because liquidated damages fall within the framework of rules governing pecuniary compensation, but do not affect other remedies; a contract which contains a provision for liquidated damages could still be seen to fall within Section 12(c) of the Act on the basis that this sum would not afford adequate relief. Of course, if on a true construction of the contract the payment of a sum of money is not agreed as compensation for breach, but as primary performance (like a price), Section 20 will not apply to it. So for example, if a distribution contract provides that on termination of the distribution agency a sum of money will be paid to the agent, this is not a provision for payment in the event of breach, rather a promise to pay a sum on lawful termination of the contract.

Section 20 does however provoke the question whether parties may provide in their contract that in the event of breach there shall be no suit for specific performance. In principle it should be possible to do this; it is hard to see why the court would wish to exercise its discretion in favour of a party who had contracted not to ask for it. But the law is not yet settled.¹⁷ By contrast, if the parties by their contract provide that in the event of breach a suit for specific performance may be brought and will not be resisted by the other party by reference to the provisions of the Act (with the intention that the court will issue a decree when it would not otherwise have done so), it seems most unlikely that such a contract term will bind the court or cause it to exercise its discretion in a way in which it would not otherwise have done.

¹⁵ In some foreign common law systems, there was a divided court system, with one set of courts capable of giving traditional common law remedies such as damages, and another dealing with 'equitable' relief such as specific performance, and an immense amount of complication as a result. This was never inflicted on Myanmar, so all relief can be obtained from the one court, in a single suit. Life is very much better that way.

¹⁶ *U Tin Myint v U Khin Myint* (1965) BLR 1050 (CC).

¹⁷ See further and more generally, Chapter 3.6, on the issue of waiver.

(e) Contracts which cannot be specifically enforced

There are some contracts which the Act identifies as those for which specific performance cannot be ordered. Section 21 does not provide that these are the *only* cases in which the decree cannot be made, but cases falling outside Section 21 will be governed by the discretion of the court. According to Section 21:

21. Contracts not specifically enforceable. The following contracts cannot be specifically enforced:-

- (a) a contract for the non-performance of which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms;
- (c) a contract the terms of which the Court cannot find with reasonable certainty;
- (d) a contract which is in its nature revocable;
- (e) a contract made by trustees either in excess of their powers or in breach of their trust;
- (f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;
- (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;
- (h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist...

Some of these provisions call for little comment. For example, (a) simply reaffirms the basic principle that a decree of specific performance is not available where compensation would be an adequate remedy: the rule is the counterpart of Section 12. As to (c), the rule is curious and unexpected, for if the court cannot find the terms of the contract, one would suppose that there was no contract because the agreement would be void. Presumably what this has in mind is the case in which, although the contract is sufficiently certain to be valid and enforceable under the Contract Act, what would be precisely required by an order of specific performance cannot be laid out; the point will come up again in relation to Section 21(g) below. As to (d), if the contract was one which the defendant was entitled to revoke, as for example with a partnership agreement which contains no provision restricting its dissolution, or an agency, it would be odd to decree performance today of a contract which could be lawfully ended tomorrow. As to (e) and (f), it is obvious that a decree cannot be made to require specific performance of a contract which should never have been made, even if the contracting parties were held to have had capacity to make it; and as to (h), in such a case the contract may be void on account of a mistake as to the subject matter, but if it is not, it still cannot be enforced by a decree.

Section 21(b) makes a more important point. A court cannot be expected to decree performance of a contract which would require persons whose relationship has broken down to co-exist. If the government dismisses a civil servant, or a master

dismisses a servant, they may do so in breach of contract and be liable to pay damages as a result, but they cannot be ordered or required to allow the servant back into his position.¹⁸

If the relationship of trust and confidence between employer and employee has broken down, there is no sense in a court ordering the employer to take the employee back on; if the personal relationship between a company and its accountant or auditor has broken down, it would be pointless to decree specific performance of a contract which depends on the personal relationship of trust and confidence; if the relationship between an artist and the person who has commissioned him to paint his portrait has broken down, no sense would be served by requiring specific performance of the contract. In such cases, the law recognises the inevitability of the facts, and a clear break payment of compensation is the only practical solution.

The problem of supervision is a general one: if a court orders specific performance, it does not dispose of the suit, but has to be prepared to supervise the performance of the decree it has issued. It either has to be in a position to supervise the performance on which it has insisted, or it has to be able to deal with the prospect of the plaintiff returning to court to complain if the plaintiff considers that the defendant has failed to do what he was ordered to do. There are some contracts for which this is just unrealistic, and a court may therefore refuse to decree their performance.

In the case of, say, a contract to build a house, or to drive a person to work every day for a year, the problems are also within the domain of Section 21 (b). The precise terms of the building contract - materials, level of expertise, quality of building, time for performance of the work - may not be capable of being ascertained or defined by the court, with the result that the court could not be sure, if complaint were later to be made by the plaintiff, whether the defendant had complied with the order. To order the defendant to build a house is one thing; to be able to explain what this means in detail is quite another. It follows that a contract may be certain enough to be enforced by the award of compensation if it is not performed, but it may not be certain enough to make specific performance a sensible remedy for its breach.

(f) The exercise of discretion

The point has been made time and again that a claimant has no right to a decree of specific performance. The court has a discretion, but one which it exercises in a principled way.¹⁹ According to Section 22:

¹⁸ See *U Tha Din v The Secretary, Revolutionary Government of the Union of Burma, Department of Supply and Cooperation* (1963) BLR 556 (CC) (the decision was given by U Maung Maung J, who explained that especially in the case of the public service it has to be like this for reasons of the security of the state which will be exercised for the welfare of the people, so putting an end to any anxiety. The judge proceeded to find that there was in this case no basis for a claim for compensation for breach of contract, because there was no basis on which the court could find that the government had acted in breach of the law). For an earlier (pre-revolutionary) decision to the same general effect, see *U Tha Din v The Secretary, Ministry of Cooperative and Commodity Distribution* (1959) BLR 94 (SC).

¹⁹ We will not here stop to consider exactly how far, if at all, this is different from an award of damages where there are also flexible principles applicable.

22. Discretion as to decreeing specific performance. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal...

In effect, the discretion is exercised in accordance with precedent. The Section identifies three circumstances in which the court is entitled to exercise its discretion in a particular way, but the broader point is that the relief must conform to the standards of justice and equity.

(g) Bars to relief which are personal in nature

In addition to the list of contracts which may not be decreed for specific performance in Section 21, there are also persons in whose favour the decree may not be made. These cases are set out in Section 24:

24. Personal bars to relief. Specific performance of a contract cannot be enforced in favour of a person-

- (a) who could not recover compensation for its breach;
- (b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be enforced;
- (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract;...

Specific performance is, historically speaking, an equitable doctrine, even though in Myanmar this is not essential to its understanding as it is a statutory form of relief. But in those jurisdictions of the common law world which still view specific performance as an equitable remedy, certain 'maxims', or general guideline principles, are sometimes used to explain where and why the court will exercise its discretion in a particular way. For example, it may be said that 'he who comes to equity must come with clean hands': that is to say, that a person who asks the court to exercise its discretion in his favour cannot expect to succeed if, for example, he has already been in breach of his side of the contract. Similarly, 'he who seeks equity must do equity': if there are elements of his side of the contract which he has not performed, and could not be required or compelled to perform, it would be unprincipled for that person to obtain a decree when, on the current facts, none could be obtained against him. The remedy has to be mutually available. The chance of obtaining the decree is also liable to be lost if the plaintiff delays in applying for it: 'equity assists the vigilant, not the tardy', as is sometimes said.

If the plaintiff is someone who could not obtain damages - say she was the agent who negotiated and made the contract on behalf of his principal, so that he is not party to the contract, and not within the list of persons permitted by Section 23 to seek relief - there is no reason for her to have the right to bring a suit for specific performance. And if she has already claimed damages and has received them, it must be obvious that she cannot now ask for specific performance: she may have had a choice of remedy, but once that choice has been exercised, the option is spent.

Section 27 identifies the persons against whom a decree may be ordered: in essence this includes the original parties and those who claim title to property through them unless they had no notice of the contract affecting the property.²⁰ Section 28 identifies persons against whom a decree will not be ordered, but these are people who would have had an option to rescind the contract, or would have been very close to meeting the requirements to have the option to rescind the contract.

(h) Failure to comply with order for specific performance

If the court does not originally specify the date for performance, it may do so at a later date; and the court which fixed the date for (specific) performance may extend it.²¹ But a failure to comply with a decree of specific performance is liable to be treated as a civil contempt of court under Section 2(c) of the Contempt of Courts Act 2013, and is punishable in accordance with Section 11 of that Act.

9.2 Injunctions to restrain commission of a breach

A decree of specific performance requires the defendant to the suit to act in the way which the contract required her to do: it is a form of specific relief by which a court compels the performance of a positive act. But in many cases in which a contracting party proposes to break a contractual promise, by doing something inconsistent with the promises she has made, or by doing an act which will mean she becomes unable to do the things she had promised to do, the plaintiff may apply for an injunction. The injunction is, like specific performance, a discretionary remedy, but it is in principle easier for a court to contemplate making an order which directs a defendant to refrain from doing something than it is to make an order which requires her to perform a promise whose details may be bothersome to define. It is also less of an infringement of individual liberty to be ordered not to do something than it is to be ordered to do something.

An injunction may be obtained for all manner of threatened wrongs falling outside the context of a breach of contract. The threatened commission of a trespass to land or other tort, for example, may be prevented by injunction; a breach of trust may be restrained by injunction; and so forth. We will limit our attention to the cases in which the basis for the injunction is a threatened breach of contract.

(a) The basis for obtaining an injunction

The basis for obtaining an injunction is expressed in Section 54 of the Specific Relief Act as the threatened 'breach of an obligation'. Section 54 of the Specific Relief Act provides as follows:

²⁰ *Ko Phan Nga v Daw Pway* (1951) BLR 457 (HC). But all the illustrations given in relation to Section 27 are of contracts for the sale of land, where the in-principle enforceability of a contract for sale against a third party with notice of it is well established.

²¹ *Ko Ba Chit v Ko Than Daing* AIR 1927 Ran 311, (1927) ILR 5 Ran 615; *Saw Aung Gyaw v Maung Aung Shine* (1953) BLR 68 (HC).

54. Perpetual injunctions when granted. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act . . .

The reference to Chapter II of the Act is to the provisions governing decrees of specific performance. It follows that, as regards a threatened breach of contract, the court is to be guided by the rules which apply to specific performance, which we considered above. But it is important to notice that the Act says ‘be guided by’: it does not say that it is to follow them slavishly. There is, as has been said above, much less difficulty about enforcing a contractual obligation not to do something than there is with an obligation to perform an act or a service the detailed definition of which would make it unsuitable for enforcement by decree of specific performance. It may be that a court could not make an order of specific performance to require a person to perform a particular service for the plaintiff, but it may be able to grant an injunction to prevent the defendant from working or performing for a rival if this work or performance would involve a breach of contract. Section 56(f) does say that if the contract is not one which could be specifically enforced, then an injunction may not be granted, but this cannot be taken too literally, for the reasons why a contract may not be specifically enforceable may not be relevant to the injunction. And more clarification is provided by Section 57, which makes the point clearly:

57. Injunction to perform negative agreement. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far it is binding on him.

Everything will depend on the facts of the individual case, and the careful analysis of the express and implied promises in the contract.

Otherwise, if a defendant is threatening to breach a contract with the plaintiff it may be possible to obtain an injunction. If the promise in the contract is a negative one, such as a promise by an employee not to disclose information belonging to his employer, or a promise not to negotiate with rivals during the period for which the parties have made an enforceable lock-out agreement, it is not difficult, if the application can be made in time, to see that the proper remedy is an injunction: in cases in which the contractual promise is a negative one, to not do something, and especially where it is uncertain how great would be the loss resulting from the breach, an injunction is the normal and proper remedy. And to cater for the fact that it may be necessary in practice to obtain relief more quickly than is usually possible, Sections 52 and 53 make provision for the court to order an injunction on a temporary basis,²² in this case to prevent irreparable damage which might result if nothing

²² For the relevant procedure, see Code of Civil Procedure 1909, First Schedule, Order 39 rules 1 and (especially) 2. For illustration, see *Esoof Hashim Mehtar v Ali Hashim Mehtar* (1963) BLR 881 (CC).

could be done until the application for a final or perpetual injunction could be got before the court.

The obligation which founds the suit for an injunction may be express or implied. If I have a contract with the defendant that the defendant will let and I will hire an expensive piece of machinery, and shortly before the date on which the hire is to commence I discover that the defendant is planning to sell it to someone else, the proper analysis is that he, in putting himself in a position in which he will be unable to perform his contract with me, is planning to commit, or is continuing to commit, a breach of the implied promise to retain ownership of the machinery so as to be able to perform the contracted letting to me. Unless there is a ready market in which I can easily find an alternative machine, which is most unlikely on these facts, I should be able to obtain an injunction to restrain the breach.

Of course, if the applicant leaves it too late, there may be no real purpose in the injunction. The logic of the remedy is that the applicant should move for relief while there is still a sensible purpose to be served by ordering it. In this context, delay usually is fatal to the suit.

(b) Failure to comply with injunction

A failure to comply with an order of injunction is liable to be treated as a civil contempt of court under Section 2(c) of the Contempt of Courts Act 2013, and to be punishable in accordance with Section 11 of that Act.

(c) The rare case of a mandatory injunction

Section 55 of the Specific Relief Act gives the court power to require certain acts to be performed where this is necessary to prevent the breach complained of. In the context of contracts, this is a provision of small importance because of the remedy of specific performance.²³ But, for example, a mandatory injunction might be ordered to take down something erected in breach of contract. It is also not clear that there is power to award interim specific performance whereas an interim mandatory injunction can be ordered.

²³ But see for illustration, *Ban Hin v Mohamed Jamal* (1958) BLR 450 (HC). For a case refusing to issue such an injunction, see *VAS Arogya Odeyar v VRRMNS Sathappa Chettiar* (1951) BLR 211 (HC), though the better reason was that there was no cause of action for the relief applied for.

10

‘Restitution’ in Respect of Benefits Conferred

Where the agreement which the parties supposed they had made was void, or where the contract which they did make became void, or where a voidable contract has been rescinded, the court may have to deal with benefits that have been conferred by the parties on each other. A similar issue arises where benefits were conferred on the erroneous understanding that there was a contract, or in circumstances where there was neither time nor opportunity to make a contract.

It is now necessary to return to, and tie up the loose ends of, those cases in which the parties have acted pursuant to an agreement which was void, or under a contract which became void, or under a contract which has been rescinded because the consent of one party was not freely given. A principal reason for taking these cases at this point, and not earlier, is that they are all concerned with payments made and other benefits conferred, where the Contract Act leads to the conclusion that there is, at this point, no contract from which the answer can be derived.¹

In this respect, these issues are very similar to those which arise when there are, between the parties, what the Contract Act describes as ‘certain relations resembling those created by contract’. The tradition of the common law was to describe these relations as ‘quasi-contractual’ relationships, which is to say, relationships which gave rise to rights and obligations *as though*² there was a contract between the parties. In many other common law jurisdictions, this has been seen to rest on an obvious fiction but Sections 68 to 72 of the Act have legislatively enshrined that fiction. In applying those sections, one must therefore remember that there is no contract, that the words ‘certain relations resembling those created by contract’ are used in the Act as a heading, rather than as legal rules, and that the answers which the Act gives are set out in the five Sections.

Even so, it is more than a little strange to speak of a liability ‘resembling’ that created by a contract when the very reason for having the rules in the first place is that there is no contract to provide a solution. This has led some analysts in other common law jurisdictions to see the issues in terms of a rather different principle:

¹ This is so even in respect of contracts that have been rescinded for repudiatory breach. Although Section 75 of the Contract Act makes clear that the innocent party is entitled to compensation – and to that extent one may see the contract as a basis for the damages – there is no suggestion that the contract is the basis for dealing with remedies that have been conferred.

² ‘As though’ or ‘as if’ is the usual translation of the Latin ‘*quasi*’.

that if one person has been unjustly enriched at the expense of another, or would be so enriched if he were not required to make a payment, the court may order a payment to be made by way of restitution. This modern way of thinking about the law has produced much new thinking and writing in the common law world, but so far this has not been (overtly) seen in Myanmar.

We therefore consider all these cases, in which relief is sought on the basis that a benefit has been conferred on another but without a contract to provide the legal basis to justify it, under ten³ points, which are as follows:

1. The appropriate terminology for the relief sought and ordered;
2. Restitution in respect of benefits conferred under an agreement which was void;
3. Restitution in respect of benefits conferred under a contract which becomes void for subsequent impossibility or illegality;
4. Restitution after rescission of a contract which was voidable for no free consent or breach;
5. Restitution in respect of benefits conferred in the mistaken belief that a contract had been formed;
6. Restitution in respect of non-gratuitous acts;
7. Restitution in respect of payments (or goods) conferred by mistake or under coercion;
8. Restitution in respect of payment to discharge another's debt;
9. Restitution in respect of the supply of necessities;
10. Other cases.

10.1 The appropriate terminology for the relief sought and granted

The Contract Act sets out the circumstances in which various kinds of relief may be granted in the cases which are examined in this Chapter. In various places the Act refers to the actions which a defendant may be required to perform as 'compensation'; in others it says that the defendant may be required to 'reimburse', 'repay', 'restore', and 'return'; in addition, the Myanmar courts have used the term 'remuneration' in some cases concerned with work done. The differences between these terms are linguistic rather than legal. For example, one 'returns' or 'restores' property to the person who previously had it and may still own it, but one 'repays' money. One is 'reimbursed' in respect of expenses incurred or liabilities undertaken or 'remunerated' in respect of work or services which one has provided and which might otherwise have been paid for; and 'compensation' is sometimes used as simply a reference to a monetary award in respect of a benefit conferred even though strictly speaking it refers to losses which result from the failure of a person who owed an obligation to fulfil it.

³ We will not examine Section 71, which deals with the duties of a finder of goods and who is subject to the same duties as a bailee if he takes them into his possession. This naturally fits alongside the law of bailment, which is mentioned in a very abbreviated way in Chapter 11 of this book.

Despite this rich variety of terms, it is hard to see that there are significant legal differences between them; and it is possible that the use of these different terms serves more to obscure what the court is doing and how it is doing it. For this reason, we have taken the decision to use the term 'restitution' to encompass the relief granted in all these cases. In other words, we have found it convenient to use the general term 'restitution' to refer to all remedies that respond to a benefit conferred by the plaintiff on the defendant even though the Contract Act does not use the term 'restitution' at all.

In doing so, we are acutely conscious that, in three very general provisions, Sections 65, 70 and 73 (third paragraph), the Act uses the familiar term 'compensation'. So, for example, the third paragraph of Section 73 reads as follows:

73...

Compensation for failure to discharge obligation resembling those created by contract. When an obligation resembling those created by contract has been incurred, and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

It is clear, however, that the 'compensation' here being referred to is not assessed in the same way as compensation for breach of contract under the earlier paragraphs of Section 73. In effect, 'compensation', in the third paragraph of Section 73, appears to describe a monetary award made in respect of the benefit conferred on the defendant by the plaintiff. The logic of the provision appears to be that the idea of a relationship resembling contract has been used as the template for relief, with the consequence that 'compensation' is payable for non-fulfilment of the non-contractual obligation as though it had been a contractual obligation. But the point of departure is that there is no contract, and any similarity with the manner in which the court assesses compensation when there is a breach of contract is coincidental. Using the word 'compensation' in this context merely serves as a confusing link to the standard monetary remedy for loss caused and is therefore best avoided.

It is in order to reflect the common thread which links all these cases together that we refer to the monetary award that responds to a benefit conferred as 'restitution' rather than 'compensation' or such other term as the Act may use in the particular case. In deference to the Act, however, we will frequently add a reference, in parenthesis, to the particular term used in the Act. We hope that by doing this, those using this book will obtain a clearer picture of the broad scheme of the Act than the Act itself, by its unexplained terminology, might reveal.

One final point should be made. We are using the term 'restitution' as a convenient omnibus expression; no more, no less. We are not saying, merely by using that terminology, that there is a principle of 'unjust enrichment' at work, or that this principle is the real reason why the court makes the orders which we examine in this Chapter. The Contract Act does not mention unjust enrichment and it is not overtly referred to in any judgment of the Myanmar courts. Nevertheless, it is an idea of some importance in the analysis and development of the common law, and we will

say more about it especially under the final point of this Chapter, and again in Chapter 12 on reform.

10.2 Restitution in respect of benefits conferred under an agreement which was void

One might suppose that the law would provide that if anything was paid or done by reference to an agreement which the Contract Act deems to be void, by reference to the rules which we examined in Chapter 3, it should be simply reversed or undone. In general, that is what Section 65 says; it provides as follows:

65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation to the person from whom he received it.

But the law is not quite as simple as Section 65 might suggest, because the particular reasons for the agreement being void may mean that the simple reversal and undoing of the acts done may not be appropriate: where the voidness results from the law of illegality, in particular, there are additional concerns for which the law must make allowance. But we start with the ordinary case.

(a) Benefits conferred under an agreement that is void otherwise than for illegality

If an agreement is declared by the court to be void,⁴ Section 65 provides the principal mechanism for putting things right, for restoring money and property to where it was before the so-called agreement was made. In principle, a person who has received money pursuant to a void agreement is bound to repay it: for example, if A has paid a sum of money to B in consideration of B's promising to marry A's daughter, but the daughter had died before the date on which the agreement was made, the agreement is void and B must repay the sum received.⁵ A person who has received possession of property pursuant to a void agreement which was intended to transfer ownership is bound to hand it back if it is still in his possession; and although a person who has received the benefit of another's services pursuant to a void agreement cannot return the services, he may still be required to make payment for the benefit he has received. Although the details may sometimes be complex, the general and sensible aim of Section 65 appears to be to reverse the unjust enrichment which would result if a payment, transfer or advantage, which was intended to be contrac-

⁴ *Maung Kyi Oh v Maiung Kyaw Zan* AIR 1926 Ran 7. It is obvious that the Section cannot apply in a case in which the plaintiff seeks damages for breach of contract, for the kind of voidness with which Section 65 is concerned has nothing to do with contracts which are valid and enforceable but breached by non-performance: *Martin Trading Co v U Yin Kyi & Co* (1960) BLR 197 (HC).

⁵ Illustration (a) to Section 65.

tual and therefore paid for, remained in the hands of the recipient who now discovers that there never was a contract, because there never was an agreement, and who would be under no duty to pay for it. There is, again in principle, no reason why the recipient should be able to take advantage, at the expense of the other party, of the fact that the agreement, which both supposed to have been valid, was in law void. Except in cases of illegality, which are dealt with below, the voidness of the agreement is neither party's fault but is the result of external circumstances for which neither was to blame. There is therefore no obvious reason for the law to try to say that one party is more or less deserving of the relief than the other.

There is an interesting general issue of interpretation concerning Section 65. The marginal note to the Section suggests that it applies in the context of a 'void agreement', purely and simply. But the enacted text refers to an agreement 'discovered to be void'. The marginal note suggests that it applies to any case in which the provisions of the Act examined in Chapter 3 lead to the conclusion that the agreement, or the supposed agreement, is void, whereas the latter suggests that it does not apply in a case in which the parties knew from the beginning (and so could not be said to 'discover', the voidness, because they already knew it) that the agreement was void. According to this latter view, if the parties knew from the beginning that their agreement was void, there is no compelling reason for the law to step in and help them out by ordering restitution. If both parties knew from the beginning that there was no enforceable legal basis for what they were agreeing to do, it might be thought surprising if either of them were really to expect the court to get them out of the situation in which they knew they had placed themselves; the benefits conferred should be left as they are and there should be no restitution.⁶ The Indian courts evidently take this approach.

The alternative view is that there is no need for the voidness of the agreement to be a 'discovery', or something which comes as a surprise: on this approach, Section 65 should operate, in principle at least, in any circumstance of a void agreement.

We now turn to cases of illegality, and of agreements with minors, where it would appear that one cannot simply apply Section 65 as it stands.

(b) Benefits conferred under an agreement which is void by reason of illegality

Where the agreement is void by reason of illegality, the operation of Section 65 is more problematic, for the law on repayment or return of property must not be allowed

⁶ This may be the best explanation for the troublesome case of *EM Chokalingam Chettyar v Saw Tha Dwe* (1951) BLR 275 (HC), in which the court (admittedly following the Privy Council in *Mohori Bibe v Dharmodas Ghose* (1902) LR 30 Ind App 114) held that Section 65 did not apply in the case of a 'contract' or 'agreement' which was void on the ground that it was made with a minor. However, the reasoning of the court, that the Section only applies where there was a contract or an agreement between competent parties (neither of which was possible with a child) is impossible to reconcile with the language of the Section, which speaks of 'agreements' rather than 'contracts'. And as the court proceeded to order repayment on general equitable grounds, it is hard to see that its strained interpretation of Section 65 had any practical effect, or has any utility. It is better to consider the decision of the Privy Council as wrong in law.

to undermine the law on illegality. To put the matter in simple terms: if I pay someone a sum of money to commit theft or murder, and the theft or murder does not take place, it would be surprising if I could get my money back by reference to Section 65: the law can hardly be that either the murder for which I paid is done or I am entitled to a refund of my money. The law ought to say, and probably does say, that the party who was prepared to encourage such criminal behaviour cannot claim the assistance of the law to get his money back, for otherwise there would no risk to the person who tried to make such a contract.⁷

This answer may be consistent with Section 65 although there is no exception expressly set out. If it is not, the material question probably should be whether, under Section 13(3) of the Burma Laws Act 1898, ‘justice, equity and good conscience’ require the courts to assist a person who was wicked or depraved enough to pay another person to commit a serious crime. It may be different if the person who made the illegal contract repented before the agreement was carried out: he should be able to recover, as it is presumably the policy of the law to encourage repentance before it is too late.⁸ But if there is no such timely repentance, and assuming the crime is a serious one rather than trivial, justice, equity and good conscience may tell the judge to do nothing to assist such a person, and that if the Contract Act does not make this clear, Section 13(3) of the Burma Laws Act should do it. The alternative might be to ask, who was the more at fault, and to assist only the party who was ‘the less faulty’.⁹ One might also wish to consider whether to deny restitution would be a disproportionate sanction or how central the criminality was to the contract. But, arguably, the trouble with taking account of a range of factors of this kind is that the science which allows such factors to be measured and compared does not exist; and this kind of reasoning, which is certainly encountered in the world beyond Myanmar, requires the exercise of considerable discretion by a judge which, at first sight, may not be conducive to the law’s certainty.

(c) Benefits conferred under a void agreement with a person lacking capacity

If any property has been transferred to,¹⁰ or other benefit conferred on, a minor, or other incapable person, a limited power to order ‘reimbursement’ from the property

⁷ *Maung Thain Gab v Maung Kan Taik* (1897-1901) 2 UBR 326, where the two parties were equally culpable.

⁸ *Hirjee Devraj & Co v Maung Nyun Shein* AIR 1925 Ran 49, (1924) ILR 2 Ran 414.

⁹ See *Jone Bin v A Manuel* AIR 1936 Ran 358, (1936) ILR 14 Ran 597 (money paid over by credulous party who received the ‘Spanish prisoner’ letter from a fraudster; the purpose for which the payment was made being impossible of performance and so not easily seen as illegal, even though if the facts had been as the payer assumed them to be, the agreement would have been made for an unlawful purpose: repayment ordered).

¹⁰ The transfer of property to a minor is not a contract, and the transfer is not intrinsically void if the transferor had capacity to transfer: *Maung Aung Nyan v Maung Gyi* AIR 1916 LB 91; *Sharfarth Ali v Noor Mahomed* AIR 1923 Ran 136, (1924) ILR 2 Ran 1. However, on the distinct question whether the court may order the return of the property transferred to a minor pursuant to a void agreement, see *EM Chokalingam Chettyar v Saw Tha Dwe* (1951) BLR 275 (HC), where the court considered it to be equitable to do so. The source of the equity was not identified.

of the incapable party is given by Section 68 of the Act, which is considered separately below. Outside the context of such supplies, other transfers, provisions and payments to a person lacking capacity to contract fall within the scope of, and are governed for remedial purposes by, Section 65.

10.3 Restitution in respect of benefits conferred under a contract which becomes void for subsequent impossibility or illegality

The reference in Section 65 to a contract which 'becomes void' refers, most obviously, to a contract which becomes void for subsequent impossibility or illegality. This effect, for which Section 56 provides,¹¹ was considered in Chapter 3.

Though the effect of the second paragraph of Section 56 is that, when such a supervening event takes place, there is no longer an obligation to perform, it is possible that some acts of performance had been undertaken before the date on which the contract became void. Section 65 means that a person who received any advantage under the contract before it became void is bound to restore it or to make 'compensation' (that is, restitution) for it. The fourth Illustration to Section 65 demonstrates the point. If a singer is paid a sum of money to sing at a concert, but contracts an illness which makes it impossible for her to perform, she has no obligation to compensate the impresario for the profits he will now fail to make, but will be obliged to repay the advance payment.

In this respect, Section 65 works reasonably well if the supervening event occurs before any performance has taken place: in the case of the singer, before she has sung the opening aria. If the supervening event occurs after, say, she has performed two of ten contracted-for concerts, Section 65 appears to mean that she must reimburse the whole of the fee paid to her, but the impresario, who has received the advantage of two concerts' worth of performance will, in his turn, have to make 'compensation' for what he has received.

10.4 Restitution after rescission of a contract which was voidable for no free consent or breach

In the case of a contract which was rescinded when one party, who was given the option to rescind it did so, whether this was on the ground that it was voidable from the start by reason of the absence of free consent or on the basis of a breach that allowed the innocent party to rescind the contract,¹² there should be a return of property transferred, a return of money paid, and such adjustment to the accounts as the court considers necessary to effect restitution in respect of benefits conferred under the contract.

¹¹ See also Section 32 which applies the same approach to contingent contracts.

¹² *Muralidhar Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35.

We have already considered this question in Chapter 4 and again in Chapter 7. We there explained that, while it appears to cut across the divide between void and voidable contracts, the Act is best interpreted as based on the view that, where a voidable contract is rescinded, it becomes void. This means that, in looking at restitution following rescission of a voidable contract, one must consider both Section 64 and Section 65 and not merely the first of those.

Section 64 is as follows:

64. Consequences of rescission of voidable contract. Where a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if had received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

This means that the party, who exercises the option or power to rescind, must restore any benefit which he had obtained from the other party. This is entirely as one would expect, although it is particularly noteworthy that it extends to the situation where an innocent party has rescinded a contract for breach: that is, the guilty party is entitled to restitution of the benefits it conferred on the innocent party.¹³ For example, if the seller of rice delivers only half of the quantity promised, but fails to deliver the rest, the buyer may put an end to the contract in accordance with Section 39, and by doing so rescind the contract. The buyer will be required to pay for the quantity of rice which he retains, as Illustration (b) and (c) to Sections 64 and 65 explains; but the buyer will always have its standard compensatory remedy for breach by the seller if the failure to deliver the other half of the purchased quantity causes loss to the buyer.¹⁴

However, Section 64 does not state that the party against whom the option to rescind is exercised is under an equivalent obligation. For that, it is our view that one must turn to Section 65, which was set out above.¹⁵

If that is the correct way to view the matter, Section 65 requires the non-rescinding party to make restitution to, or 'compensate', the other party for not doing so. That may appear to be a rather clumsy way of drafting the law applicable in the aftermath of rescission, but when the two Sections are read together in this way, it appears to work.

10.5 Restitution in respect of benefits conferred in the mistaken belief that a contract had been formed

Let us assume that the parties have undertaken acts on the basis that there was a contract between them when there was none. On occasion a party will perform an act, such as the delivery of goods to another, or the performance of a service, to or for

¹³ This was the actual decision in *Muralidbur Chatterjee v International Film Co Ltd* (1943) 70 Ind App 35: that is, that the guilty party was held entitled to recover payments made to the innocent party under a contract that had been rescinded for breach.

¹⁴ Illustration (d) to Sections 64 and 65.

¹⁵ Chapter 10.2, above.

the benefit of the other with whom he believes he has a contract. But if there is no contract, because there was no agreement, because (for example) there had been no agreement by one party to the terms proposed by the other, the act of delivery, or the act of receiving goods, et cetera, cannot be explained, and its consequences regulated, by reference to the contract between the parties. If the parties have not agreed the terms for payment (or the mechanism by which the price may be determined), or have failed to agree other major terms, there will no contract, and the answer will be the same even if they supposed that a contract was going to come into existence.¹⁶

Such cases easily arise. Suppose a developer and a supplier of building services are negotiating a contract for the supply of services to be performed on the developer's site, and that (as is not uncommon) the parties are more interested in the building work than in the paperwork. Suppose the service-provider's business documents provide that his services are subject to a price variation clause, allowing him to increase the price in certain defined circumstances, but that the developer's business documents provide that all services are supplied at a fixed price and that no variation of the price is permitted. And suppose that the parties negotiate by correspondence, each side using its standard documentation which contains its own terms. What happens if, at some point, the work is done but there is then a dispute over the price to be paid? One possible answer might be to say that if the service-provider did the work after the last communication from the developer, that was an acceptance by conduct of the terms proposed by the developer, and an agreement is therefore made on the developer's terms. Another would be to say that the acceptance of the services by the developer was an acceptance by the developer of the service-provider's terms; and the truth is that neither analysis is any more persuasive than the other.¹⁷

The answer may therefore be that there was a mistaken belief that there was an agreement between the parties on terms which a court could enforce, and that there has actually been a failure to agree. In those circumstances the services provided and accepted, cannot be paid for by reference to the contract,¹⁸ because there was none. In these circumstances, therefore, the answer will be given by Sections 70 and 72 of the Act, which are discussed below. In assessing restitution or 'compensation' the court may take the view that where the party to whom services provided has had the benefit of them it should pay a proper price for the benefit which it has received. It may do this on the basis of an implied promise to pay a reasonable price, but however it is reasoned it would appear that the outcome will be the same.¹⁹

¹⁶ *AV & Son v Akoojee Jadwet* (1946) RLR 31 (PC).

¹⁷ In the context of a contract for the sale and purchase of goods, Section 9(2) of the Sale of Goods Act 1930 says that if there is no agreement on the price, the buyer shall pay a reasonable price. This presumably reflects the fact that a failure to agree the price is not uncommon in cases of sale of goods, and the alternative conclusion, that there was no contract, is just too inconvenient to be acceptable.

¹⁸ Indeed, if there is a contract between the parties, the answer must be found in the contract, and Section 70 cannot apply: *Sadik Maisty v Mabomed Auzam* AIR 1916 LB 56.

¹⁹ *AV & Son v Akoojee Jadwet* (1946) RLR 31 (PC).

10.6 Restitution in respect of non-gratuitous acts

Some of the most interesting cases are those in which a benefit²⁰ has in some sense been conferred on a person, and that person has had the benefit of it, even though he did not contract in advance to receive the benefit, and did not ask for it to be conferred on him, and now says that he did not want or welcome it. If the person conferring the benefit, or the alleged benefit, did not intend it as a gift, Section 70 may allow a claim to be made. It provides as follows:

70. Obligation of person enjoying benefit of non-gratuitous act. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the latter in respect of, or to restore, the thing so done or delivered.

The common sense of Section 70 is obvious: if the benefit conferred on a recipient is one which ought to be paid for, but no agreement has been made by the parties to provide for that payment, the court steps in and makes an appropriate order. The problems of when and how much arise very quickly, and it is equally quickly seen that unless we can discern an underlying principle, the court will have nothing to guide it to an answer in the immediate case, and nothing to point the way to a predictable answer in the next case.

In several suits brought before the courts after the surrender of the Japanese and the return to Yangon of property owners who had fled, it was stated that there are three conditions for relief to be granted. First, the act of the claimant must be lawfully done; second, it should not be the doer's intention to do it gratuitously; and third, the other party should have enjoyed the benefit of it. Section 70 does not apply where the act relied to justify the claim is the payment of money.²¹

For illustration, we can start with the two examples given by the Act. In one, a tradesman leaves goods at A's house by mistake, and A treats them as his own. A is bound to pay for the goods. The delivery to A was not pursuant to an actual contract, but was not intended to be done by way of gift. As A has unquestionably enjoyed the benefit of the goods, just as he would have done if had paid for them, it is appropriate that he pays for them, probably at the usual price of sale. It would be otherwise if there was an express contract between the tradesman and another that the goods should be delivered to A's premises: in such a case the claim lies on the express contract, and no claim lies against A under Section 70.²²

It may be asked why this case, which the Act deals with as an illustration of Section 70, is not dealt with instead by Section 72. The answer probably is that the two provisions do to some extent overlap and, as the result would be the same in

²⁰ For a case in which the court took a pragmatic view of whether something was a benefit (Japanese notes pretending to be currency notes, with no legal status in Myanmar were still considered to be a benefit in practice) see *Ko Maung Tin v U Gon Man* (1947) RLR 149.

²¹ *Maung Tun Myaing v U Tar Toe* (1947) RLR 488; *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC).

²² *Sadik Maisty v Mahomed Auzam* AIR 1916 LB 56.

either case, it probably does not matter which Section one proceeds under. Perhaps Section 70 alone applies if the mistakenly delivered goods have been consumed so that they cannot be returned.

In the other Illustration given for Section 70, a person saves B's property from destruction by fire. If he had intervened gratuitously, that is to say, he intended at the time of intervention that no payment would be sought for the intervention, he will have no claim. Although the Act does not say so expressly, if the rescuer had acted on the basis, or with the expectation, that he would be paid, he will have a claim: in other words, the altruistic neighbour will tend to have no claim, whereas a private professional fire service may have (although a national fire service will no doubt have a statutory duty to intervene and would presumably fall outside this Section for that reason). If that really is the law – and it seems that it is – not everyone will accept that it has adopted the right approach. However, the law is concerned with legal obligations, not with moral or social duty.²³ In this example, B, if she is an honourable person, will 'compensate' the person who saved her property whether or not the rescuer intended to do so gratuitously. But if B is not honourable in this regard, the law intervenes to 'compensate' only those who did not intend to provide services gratuitously in circumstances in which there was neither time nor opportunity to negotiate the terms.²⁴ It does not 'compensate' those who made a gift of their services, but leaves it to individual and community ethics to decide what response there should be.

If we revert to the case of the individuals who occupied abandoned property in Yangon and, as they said, tried their best to protect the property of the absentees from destruction by the enemy,²⁵ one may see how a claim may be formulated by reference to Section 70. The analysis of the evidence, however, may be more complicated: the cases show that a claim of intervention to preserve the property of another is as easily made as is the counter-allegation of uninvited and self-serving intrusion in the affairs of another.²⁶

(a) Acts lawfully done

As to the first point, namely whether their acts were lawfully done, the answer will be yes if they were, for example, employees or recent former employees with a sense of duty and a legitimate expectation of payment; it will be otherwise if they were no more than busybodies,²⁷ or opportunist strangers who simply trespassed and then sought to make a virtue of their wrongdoing.²⁸ If the doer and the recipient were parties to what had been supposed to be a contract, but which failed to satisfy the formal requirements of the law, the acts of the doer, in the belief that he was acting

²³ See the rather striking observations in *Daw Thin Hlaing v G Gordbandas* (1965) BLR 594 (CC) at 598.

²⁴ Marine salvage would be a similar kind of relationship.

²⁵ *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC).

²⁶ *Esoof Ismail Attia v Yacoob Ahmed Mamsa* (1948) BLR 684 (HC) (took possession of defendant's shop and sold the stock; not a lawful act, and probably not a benefit either: no compensation).

²⁷ *Official Receiver, Rangoon v Mulla* (1950) BLR 320 (HC).

²⁸ *Esoof Ismail Attia v Yacoob Ahmed Mamsa* (1948) BLR 684 (HC).

pursuant to a contract, will be lawful for the purpose of Section 70.²⁹ In other cases the test will be whether the relationship was such as to generate a reasonable expectation of reward; the courts have explained that the term ‘lawful’ has a broader meaning than ‘strictly legal’.³⁰ The finding that the acts were lawful prevents the doer being seen as a meddler.³¹ There is some suggestion in the cases that the court should be cautious before finding this element of the test to be satisfied, but this probably means no more than that the court should make a careful appraisal of the evidence, which may well be conflicting.

(b) Acts not intended to be gratuitous

As to the second point, that the acts done were not intended to be gratuitous, there is little to say that has not been already said. The fact that they were not intended to be gratuitous obviously does not mean that the claim will succeed, but this is a necessary condition.

(c) Defendant enjoyed the benefit

As to the third point, that the defendant has enjoyed the benefit, one may subdivide this into two related sub-issues (although the ultimate issue is whether this defendant was benefited so that these two sub-issues tend to merge). The first sub-issue is that there actually was a benefit; the second that the defendant can be said to have enjoyed it.

(i) Was there actually a benefit?

The first sub-issue reflects the fact that not all interventions are obviously beneficial. Suppose I hear reports that a large storm will arrive in two days’ time, and that as my neighbour is away from home and cannot be contacted, I quickly arrange for work to be done cutting down the large trees which grow in his compound, to prevent the storm blowing them down and damaging the house. Suppose that the storm changes direction and does not arrive; and that my neighbour, when he discovers what I have done, is unhappy and refuses to pay anything. Can it be said that the cutting of the trees was a benefit? It is not easy to say. There may be disagreement whether the work was necessary or wise: if the trees were old and had survived previous storms, it may not have been beneficial at all to cut them down. Certainly the work turned out to be unnecessary on this occasion, even though it may have been prudent. The defendant may say that he did not care whether his house was damaged, for houses can be repaired, but a magnificent old tree takes a hundred years to replace, and that the work done was, as far as he was concerned, unwanted and destructive. From this simple example we may see that it is not always easy to see and agree that there was a benefit in the thing done. It may depend on whether we assess this from the perspective of

²⁹ *Zulaing v Yamethin District Council* AIR 1932 Ran 176, (1932) ILR 10 Ran 522; *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC).

³⁰ *Official Receiver, Rangoon v Mulla* (1950) BLR 320 (HC).

³¹ *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC), at 523.

the doer or the defendant, and whether we take account of the views – which may be idiosyncratic and peculiar – of the actual defendant, as opposed to the views of a notional ‘reasonable man in the position of the defendant’. No clear answer to this question may currently be given.³²

(ii) *Did the defendant enjoy the benefit?*

The second sub-issue concerns whether the defendant can be said to have enjoyed the benefit of it. He may say that it was forced upon him, and that he was given no choice in whether to accept the benefit. As has sometimes been said, if a man cleans your windows, what can you do except look out of them? You had no choice to say yes or no to the acceptance of the benefit; it is not as if you could return the water and the labour to the window-cleaner and restore your windows to their former dirty condition. Again, suppose that someone launders my clothes in the mistaken belief that we had made an agreement for this to be done: no doubt my clothes are better clean than dirty, but the benefit has been forced on me, rather than claimed by me. In those circumstances, is it right to say that I have ‘enjoyed’ the benefit?

The obvious concern is that of the case in which there appears to have been a benefit to the defendant, in the sense that he appears to have been objectively better off than he would have been if the service had not been provided, but who nevertheless had no real choice in whether to receive, or accept, or enjoy that benefit. Why should he be forced to pay for something he did not ask for, did not want, and maybe could not, and now cannot, afford to pay for?

There is some guidance in the cases. Where work was done for a local council which fell within the council’s regular business (clearing jungle, mending roads), it was easy enough for the court to conclude that the council had enjoyed the benefit, though in that case the parties had supposed that they had concluded a contract, and it would have been impossible for the council to argue that it did not enjoy the benefit of the work.³³ By contrast, it has been held that the Official Receiver is merely an officer of the court and cannot be said to be a person who enjoyed the benefit of work done to the property of another person,³⁴ though a person aggrieved by his conduct may bring ordinary proceedings against the receiver.³⁵

Where the alleged benefit was the safeguarding of the defendant’s house and business in times of war or civil commotion, the evidence may³⁶ show that there probably was a benefit, but even if there was, the defendant may argue that he had had little choice

³² For the case in which so-called ‘currency notes’ issued by the Japanese occupation forces, were obtained, and had to be treated as a benefit to the party obtaining them for the purposes of Section 70, even though they were not legal tender (but had been treated by the parties at the time as though they were) and were as a matter of law of no benefit, see *Ko Maung Tin v U Gon Man* (1947) RLR 149 (discussed by Min Thein, *Judicial Journal*, Vol 3 Part 2, English Section, p 15).

³³ *Zulaing v Yamethin District Council* AIR 1932 Ran 176, (1932) ILR 10 Ran 522.

³⁴ *Official Receiver, Rangoon v Mulla* (1950) BLR 320 (HC).

³⁵ *Mooljee Maracan & Co v M B Mehta* AIR 1940 Ran 59; *CK Chin v Hajee Ebrahim Mohamed Seedat* (1959) BLR 53 (SC).

³⁶ Though there may have been heroic efforts which came to naught; on the other hand, the doer may have kept looters at bay by making gifts of the defendant’s property so that the benefit is more apparent than real.

to accept or reject it, and so the enjoyment of the benefit was, in this case as well, forced on him. It would be unacceptable for the defendant to argue that the benefit was forced on him and that as a result there was no need to pay for it, and it would be just as hard to allow a plaintiff to assert that he had conferred an undeniable benefit on a defendant so that it was pointless to ask whether the defendant chose to enjoy it or not. In the principal case in which the issue arose, the judge took a practical view and accepted that as the evidence tended to show that the defendant was probably better off as a result of the intervention, some measure of payment was due.³⁷ Even so, the question is not whether it would be moral or proper to pay for the benefit, but whether the law considers there to be an obligation to do so.³⁸ It may be helpful to ask whether the defendant would have done the work himself if had been in a position to do so; if the answer is yes, it is very hard to deny that he has enjoyed the benefit of the work done by someone else;³⁹ but if the answer is no, it does not necessarily follow the defendant has not enjoyed the benefit of it.

(d) Quantification of the sum to be paid

So far as concerns the valuation of the benefit and the quantification of the restitution or ‘compensation’, to be ordered, the court will have to use its common sense (as the ‘guidance’ given by Section 73 is not helpful). If it is sensible in the circumstances to ask what price the recipient defendant would normally have had to pay for the service, this may be an appropriate figure.⁴⁰ Where there is no way to assess this, and where there is no reliable way to assess the extent to which the acts of the doer have actually benefited the defendant, not least because it is impossible to know what would have happened if they had not been done, the court will have to find another basis. If, for example, a person has occupied property as though he were a security guard, it may be able to order payment of a sum assessed as though it were a wage. Otherwise it will have to do the best it can. The likely starting point is the market price for the benefit.

What all this may be taken to show is that the analysis of the relations as ‘resembling those created by contract’ is not very convincing. Where the parties do conclude a contract, their agreement forms the basis for everything that the court orders in the event of dispute; and in cases in which the parties thought that they had concluded a contract, their (void) agreement may still provide the background against which the court exercises its powers. By contrast, in the cases which have arisen under Section 70, and which come to court because of differences which the parties have not been able to reconcile, there is no framework of agreement to guide the court in the exercise of its powers: there is an absence of agreement, or an actual disagreement, concerning the material facts. The relations do not resemble those created by contract; they are the very opposite of a relationship created by contract.

³⁷ *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC).

³⁸ *Ram Tubul Singh v Biseswar Lall Sahoo* (1875) 2 Ind App 131 (cited here, because referred to with approval in *Official Receiver, Rangoon v Mulla* (1950) BLR 320 (HC)).

³⁹ *Sei Sheng Co v U Thein* (1948) BLR 159 (HC).

⁴⁰ *Sei Sheng Co v U Thein* (1948) BLR 159 (HC).

Perhaps it is only when this is understood that the law will be able to focus properly on the issues which ought to govern the claim for payment.

10.7 Restitution in respect of payments (or goods) conferred by mistake or under coercion

We need to consider the two cases separately, for the issues are not identical.

(a) Mistake

If money or property is paid or delivered to another by mistake, one might well expect that the law would provide a mechanism for putting things right. If I pay for goods in a shop and hand over a 5,000 kyat note, but the shopkeeper is distracted and hands me change on the basis that I have given him a 10,000 note, one would expect the law to provide for the repayment of the amount which I was not supposed or entitled to receive.⁴¹ Section 72 does this, and it provides as follows:

72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion. A person to whom money has been paid, or anything delivered, by mistake or coercion, must repay or return it.

The language of the Section is broad and general. Perhaps unfairly, a judge in 1934 said that Section 70 'is one of those pretentiously comprehensive statements which are so unhelpful to the practical lawyer',⁴² which is another way of saying that there are many questions which a judge may need to answer before he can give judgment, but on which the Act gives him no clear guidance.

Claims made under Section 72 are not restricted to cases in which the mistake of the parties was the belief that they were bound to each other by a valid contract. According to the Illustrations given in the Act, a payment made to a recipient in the belief that a debt to him was outstanding when it had already been discharged may be recovered. So for example, if a person makes a payment to X, to whom he believes himself to be indebted when he is not indebted to X but to Y, he may rely on Section 72 to bring a suit against X.

Although this has been departed from in most jurisdictions, the mistake must be one of fact rather than law;⁴³ and it must be a mistake which is directly related to the relationship between plaintiff and defendant (sometimes referred to as being a mistake as to supposed liability). For example, if a plaintiff pays money to a defendant because she believes that the state of their account is that she owes this sum, but in this she is mistaken, she may claim under Section 72. But if she pays money to the

⁴¹ If the person does not hand back the overpayment, there may be a separate question of whether he commits the offence of criminal misappropriation of property under Section 403 of the Penal Code. That issue is not pursued here.

⁴² *Lloyd's Bank Ltd v Administrator-General of Burma* AIR 1934 Ran 66.

⁴³ *Lloyd's Bank Ltd v Administrator-General of Burma* AIR 1934 Ran 66; and compare with Contract Act, s 21.

defendant because she mistakenly believes that she has just received a sum of money from a third party, and can now afford to pay the defendant, or because she mistakenly believes the defendant has just concluded a contract with a third party and is now in a good financial position, she cannot rely on Section 72 and say that the payment to the defendant was made by mistake. Of course in one sense it was: the plaintiff payer would not have made the payment if she had known the full truth. But the mistake which she made was nothing to do with the defendant: it was quite outside, and had nothing to do with, their relationship, and no claim for repayment can be made.⁴⁴ Again, the law has developed in other jurisdictions so that the scope of mistake of fact is not as narrowly drawn as it is in Myanmar.

If the payment was made by someone who was himself wholly to blame for the mistake, in the sense that he was completely forgetful when he should have known better – say he has paid twice, having forgotten that he has paid already – he may still recover from the payee. At first sight, this may seem odd. On the other hand, even if the payer is careless, it is hard to see how this could give the payee the right to keep the money or the property, assuming he still has it, when he had no claim to it at all. Of course, if the payer was under a contractual duty not to make the mistake – say, for example, a contract between the parties required the payer to ascertain the true balance of the account and to pay accordingly – it seems unlikely that a claim for repayment could be made under Section 72, for an automatic right to claim repayment would undermine the contract which the parties had made.

There will be many cases for which the language of Section 72 does not yet provide a clear answer. Suppose, for example, a payment is made to a creditor on the mistaken belief that proceedings to recover it have not yet been barred by limitation, when in fact they have been so limited and a suit to recover the debt could have been defended on this ground. The payment will discharge the debt, though it is also true that the payer would not have paid it, but would have relied on the law of limitation, if he had not made this mistake. How Section 72 relates to such a case is not clear. The general principle for which Section 72 stands is very clear and very sensible. But the judges have felt it necessary to cut down its apparent width and it is therefore the way in which it applies in practice which is the challenge.

It is very important that the existence of the statutory claim under Section 72 does not preclude the possibility of defences. If the mistaken payment was received in good faith, and the money has been spent in the belief, held in good faith, that it was the recipient's money to spend, it may be that a defence will be allowed to answer some or all of the claim.⁴⁵ Of course, if a bank makes a mistake and credits my bank account with a million dollars and I set about spending it quickly, hoping to deploy the argument that I spent the money in the honest belief that it was mine to spend, a court will not find it difficult to disbelieve me. But with a much smaller payment the defence may have a better chance of success. Whether there are other defences, in addition to this 'change of position' defence, has yet to be established.

Many systems of law maintain a separate set of rules for the repayment of payments made by and to the Government. If these exist in Myanmar (and that is a

⁴⁴ *China and Southern Bank Ltd v Te Thoe Seng* AIR 1926 Ran 14.

⁴⁵ *Lloyd's Bank Ltd v Administrator-General of Burma* AIR 1934 Ran 66.

question beyond the scope of this book), they may add to, or displace the general provision of Section 72. But most of the mistakes in question in relation to such payments are likely to be mistakes of law not fact so that, if this distinction is maintained, restitution is unlikely to be required in most cases.

(b) Coercion

We have seen in Chapter 4 that coercion is defined in Section 15 of the Contract Act as including threats to commit crimes or threats to detain property unlawfully; and we have also seen that there is an argument that the law might be developed by the courts to include threats to break a contract. That was all explored in the context of threats, or pressure, inducing the making of a contract. But what if there is no contract made between the parties and instead all that happens is that the threatened unlawful conduct induces the plaintiff to make a payment to the party who is making the threat (or indeed to someone else)? Can the person making the payment recover it? The answer given by Section 72 is that she can. The Illustration given in the Act exemplifies the point. Say a railway company refuses to give up goods to the person entitled to those goods unless paid an illegal and excessive charge. If the person pays that excessive charge, she is entitled to restitution of the payment on the ground of coercion.

10.8 Restitution in respect of payments to discharge another's debt

The law takes the view that if A owes money to B, it is a private matter between A and B whether or when the debt is paid. As far as everyone else is concerned it is none of their business. But in certain circumstances it may be someone else's business as well, because if A does not pay his debt to B, B may do something which will damage or disadvantage C. Section 69 states the principle which explains whether C may pay the debt owed by A to B and then recover from B. It provides:

69. Reimbursement of person paying money due by another in payment of which he is interested. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Suppose I am the sub-tenant under a sub-lease, and that my landlord, the tenant under the head lease, has not paid the rent due to his landlord. It is possible that the landlord will forfeit the lease, and that as a result, my sub-lease will be lost. Or suppose I have a lease from a landlord who has not paid taxes due to the government, and that the law on taxation allows the government to put the land up for sale to allow it to recover the tax owed to it, and that if this happens my lease will be annulled. If in either of these cases I pay my landlord's rent, or the taxes owed by my landlord, Section 69 allows me to claim restitution ('reimbursement') from my landlord.⁴⁶

⁴⁶ See *Ma Mya May v Ma Lon* AIR 1933 Ran 112; *A Murray v MSM Firm* AIR 1936 Ran 47 (in each case, payment by mortgagee of land taxes owed by mortgagor in order to prevent forfeiture: reimbursement ordered).

The conditions for recovery are three in number. First, the payment must have been made, either by the plaintiff or by his agent or other person acting on his behalf. Second, the debt of the defendant which is paid must be one which was due in the sense that the defendant was compellable in (strict) law to pay it.⁴⁷ Third, the plaintiff who intervenes in the affairs of the other in this way must have had a proper legal interest in the payment of the debt, and must have acted in good faith, *bona fide*, for the protection of his own interests. If he intervenes for any other motive or reason, the law will regard him as meddling in the affairs of another, and will not assist him to recover reimbursement. Obviously there will be cases in which the plaintiff paid the debt for a combination of reasons; but the real question is whether he acted in the protection of his own interests, or genuinely considered this to be what he was doing.

Section 69 applies to cases in which money was paid, but does not apply where the plaintiff has provided services as distinct from paying money. For example, when persons who owned property in Yangon and elsewhere fled from the invading Japanese army, a number of people took it upon themselves, for a variety of motives and reasons, to move into and guard or protect (as they said) the properties from which the owners had fled; and when the owners returned, these persons made claims against the owners in respect of their services. It was held that Section 69 had no application to such facts, and that any such claim had to be made under Section 70, for they may have provided services to the absent owners, but had not paid debts which the absent owners had been liable to pay.⁴⁸ Even if these people had paid 'taxes' to the Japanese authorities, it is unlikely that they could have made a claim for reimbursement. The demands made by the Japanese occupation forces were not made lawfully as a matter of Myanmar law; and it would be difficult to see how the making of such payments could have been said to be in the discharge of debts owed under law by the absentee defendants;⁴⁹ in short, the plaintiff may have been coerced into making a payment which would, if the facts had been different, have been made by someone else; but that is not enough to bring the payment within Section 69.

If the claim succeeds, then there seems no reason at all why (subject to the change of position defence) the measure of restitution (or reimbursement) will be anything other than the full measure of payment.

10.9 Restitution in respect of the supply of necessities

We saw above in Chapter 3 that an agreement made or purportedly made with someone who is not competent to make a contract does not take effect in law as a contract. Sections 11 and 12 define competence to contract; and a person who is not of the age of majority, or not of sound mind, cannot make a contract. Yet these

⁴⁷ *Ma Ngwe Shin v Gaung Boke* (1955) BLR 283 (HC) (sum paid by tenant when land occupied by forces of Karen National Defence Organisation, considered to be an armed group at war with the state, was not paid in respect of debt which the landlord was compellable in law to pay; no reimbursement).

⁴⁸ *Ajodhya Singh v Srimati Godavari Bhai* (1949) BLR 509 (HC).

⁴⁹ But if a contrary argument were to be advanced, it would have to be on the basis of the pragmatic, as distinct from rigid, reasoning of the Full Bench in *Ko Maung Tin v U Gon Man* (1947) RLR 149.

people have to live, and the necessities of life need to be obtained by them or on their behalf. It may also be the case that the person – say a shopkeeper – who supplies something to a young person cannot be sure of the age of the young person, or to a person who may be out of her right mind. If the supply is not paid for, Section 68 provides the solution:

68. Claim for necessities supplied to person incapable of contracting, or on his account. If a person, incapable of entering into a contract, or anyone he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

In summary, if the incapable person received the supply of 'necessaries' for his own support,⁵⁰ or for the support of the wife and children he was incapable of supporting,⁵¹ the party making the supply is entitled to have restitution (that is, to be reimbursed) to the value of the necessities supplied from the property of the incapable person,⁵² but not otherwise.⁵³ It may appear that this is a case of a void agreement supporting a legal claim, but that is incorrect. The court does not enforce the void agreement according to its terms. Although Section 68 provides for 'reimbursement' to be made from the property of the recipient, it does not say in terms that the plaintiff may recover the price which was agreed, or that the incapable person is liable to make the payment. If the court considers that the price 'agreed' was excessive, there is no reason to think that the plaintiff will be able to claim this sum as 'reimbursement'.

As to the meaning of necessities, no doubt the term has some flexibility. Food, clothing and shelter or other accommodation will always have been necessities, but other things, such as a mobile telephone, which certainly would not have counted as a necessary even a year or two ago, may be argued⁵⁴ to be a 'necessary' of modern life. If the identification of a necessary is determined by asking what is 'suited to his condition in life', it seems reasonable to suppose that it takes some account of what the modern day sees as necessary: the list of necessities will surely have grown longer than it stood in 1872.

10.10 Other cases

It is not clear whether there are other cases in which a claim for restitution may be founded on a broader common law principle that where a person has been unjustly enriched, at the expense of the plaintiff, and should as a result be ordered to make a payment to reverse the enrichment which it would be unjust to retain, the court may

⁵⁰ Illustration (a) to Section 68.

⁵¹ Illustration (b) to Section 68.

⁵² *Maung Ba Tha v Daw Set* (1947) ILR 35 Ran 491, (1947) RLR 491 (supply to person out of her mind).

⁵³ *Daw Nyun v Maung Nyi Pu* AIR 1938 Ran 359.

⁵⁴ The view may be taken that, far from being a necessary, the mobile telephone is the principal curse, of modern life; the invention which disturbs its tranquillity and pollutes the quiet spaces of life, more than anything else. But it is evident that most of the world has a different view.

so order. None is mentioned in the Contract Act, but this does not necessarily mean that such a claim could not be formulated especially if the courts were prepared to develop the common law applying the principles of 'justice, equity and good conscience' in Section 13(3) of the Burma Laws Act 1898.

Say, for example, A pays B 200,000 kyat because B is to be married next week. The marriage does not go ahead. Is A entitled to repayment of the money paid? It may be thought obvious that the answer should be in the affirmative. But which provision of the Contract Act covers this given that, at the time of payment, A made no mistake? Or say A repairs a car mistakenly believing that it belongs to A whereas it belongs to B who retakes the car and sells it at a higher price because of the repairs carried out by A. Is A entitled to restitution from B for the services in repairing the car? Section 72 may be thought to provide an answer but that Section is confined to the repayment of money or the return of property and does not appear to cover mistakenly rendered services. Section 70 might be an alternative but the difficulty is that A was acting gratuitously in the sense that A thought it was repairing its own car.

Again, suppose I use your van to help a friend move home, and he pays me \$50 for the work: can you claim the money from me? Suppose I sell a picture of you to a newspaper which pays me \$50 for it: can you claim the money from me? In these cases, it may be said that the reason the money has been generated is not because of an agreement, or a relationship which resembles an agreement, between us. It comes about because I have used your property, or something which resembles your property, without your consent, and have made a gain as a result. It may be said that this has nothing at all to do with the law of contract, but lies within the domain of the law of tort: I converted your property to my use, and am liable accordingly. It may be said that it follows naturally from the idea of ownership within the law of property: the fruits of property, or the proceeds attributable to or resulting from its use should be handed or paid over to the owner of that property.

However, if we ask what I have deprived you of, the answer might be that it was the opportunity for you to sell me permission to use your property, or the opportunity to license me to use your property, and that the proper response of the law to a case like this should be to treat the parties as though they had made a contract to license or permit the use of the property, and to require restitution ('compensation') to be made as though such a contract had been made. This, after all, seems to be what Section 73 has in mind.

It may be, therefore, that there are indeed other cases which would naturally fit alongside those in Sections 68 to 72, but which are not expressed in the Act. How a court would deal with them cannot, at this point in the development of Myanmar law, be said with any certainty. But it would accord with justice, equity and good conscience for the law to provide a judicial remedy of this kind, as a supplement to the cases already given in the Contract Act.

11

Particular and Specialist Contracts

Sale of goods, indemnity and guarantee, bailment, agency, and partnership

We have dealt with the general principles of the law of contract in Myanmar. In this chapter we deal in outline with five kinds of contract which are governed by a combination of general contract law and special statutory provision. The reason for examining them here is that they were all originally dealt with in the Contract Act, and though the special provisions regulating two of them (sale of goods and partnership) have been removed from the Contract Act and re-enacted in separate statutes (Sale of Goods Act 1930 and Partnership Act 1932), they still have their roots in the 1872 Act.¹

Why should our treatment of specialist contracts not go further, and look at contracts of employment, for example? Or contracts of insurance? Or contracts concerning the transfer of property, or the creation, use and protection of intellectual property? Or arbitration agreements? Or contracts contained in bills of exchange or negotiable instruments? Or contracts for the carriage of goods by sea? In truth there is not a clear answer to those questions: a line just has to be drawn somewhere; and the reason for choosing to draw it where this Chapter draws it is that it is aligned with the original intention and scheme of the Contract Act.

The justification for making any examination of these specialist contracts in this book is the light which they shine on the way the general law of contract works: in some contractual contexts the general law of contract provides the whole of the relevant law, but in others it provides the foundation, the background, for a distinctive regulation of the effects and consequences of the legal relationship. A contract for the sale and purchase of goods is, after all, a contract: it will be formed, many aspects of the validity of the agreement, and the nature of the consent of the parties, will be assessed in accordance with Sections 1 to 30 of the Contract Act. Indeed, the most detailed examination of the rule in Section 30 on the voidness of an agreement by way of wager took place in cases concerning the sale and purchase of goods, namely quantities of rice. But the performance and effect of a contract for the sale and purchase of goods is then analysed in detail in the Sale of Goods Act, and the overall

¹ We do not look at the provisions of the Transfer of Property Act which relate to contracts, even though section 4 of that Act deems such provisions to be part of the Contract Act. To do so would require too much explanation of the purely proprietary side of transfers of property for it to be possible to undertake this task within the limited confines of this book.

result is that the contract is made up from general elements taken from the Contract Act and others from the Sale of Goods Act. Something similar is true, to a greater or lesser extent, with the other specialist contracts mentioned in this chapter. We said in Chapter 1 that the general law of contract applied to a case unless a special rule or specialist rules overrode it.² In this chapter we see, if only in outline, how this happens.

In many countries, including Myanmar, the law on the sale of goods comprises a separate course within a law degree; and partnership is studied as part of a course of business law. In these, and in courses on labour law, insurance law, intellectual property law, and so on, the student will pass briefly over the laws of contract. But what this also shows is that the general law of contract provides the basis for the great majority of economic activity in the country, and it is necessary to remember that these specialist subjects rest, in large part, on the rules examined in this book. It is because the most important of these specific contracts are usually studied in specialist courses, that this chapter will not make reference to the cases decided by Myanmar courts, but will confine its attention to the framework of statute law. With the exception of indemnity, guarantee and bailment, which do not appear to have been much litigated, there is a rich collection of judicial decisions on specialist contracts: it appears that much of the business organisation in Myanmar until recent times was on the basis of partnership and agency. But it would unbalance this book to look at all the available detail.

We will therefore look in outline at five contracts:

1. Contracts for the sale and purchase of goods;
2. Contracts of indemnity and guarantee;
3. Bailment;
4. Agency;
5. Partnership.

11.1 Contracts for the sale of goods

Originally regulated by Sections 76 to 123 of the Contract Act, the law on contracts for the sale and purchase of goods was deleted from the Contract Act and re-made, in significantly new form, as the Sale of Goods Act 1930. In the Burma Code it actually appears in Part 19, which deals with moveable property. This presumably reflects the judgment that because the Act contains detailed rules on what counts as goods, on title to and property in goods, and on the transfer of title and transfer of property in goods, it belongs alongside other legislation about property, rather than alongside statutes on the law of contract. What follows is a brief guide to the main provisions of the law. It should be stressed that, in some places, the 1930 Act uses terminology derived from English law (the 1930 Act largely replicates the English Sale of Goods Act 1893) even though this is not consistent with the terminology of the Contract Act

² See for example Sale of Goods Act, s 3.

1872. For example, 'offer' is used instead of 'proposal'; and the right of the innocent party to rescind (that is, to put an end to) the contract for breach is sometimes,³ but not always,⁴ referred to as the right to 'treat the contract as repudiated'.

'Goods' means every kind of moveable property other than actionable claims and money; and includes stocks and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; and 'future goods' means goods to be manufactured or produced or acquired by the seller after making the contract of sale.⁵ A contract of sale of goods is a contract whereby a seller transfers or agrees to transfer property in goods to the buyer for a price.⁶ The contract is made by proposal – here referred to as 'offer' – and acceptance in the usual way.⁷ If the goods perish before the contract is made, the contract is void.⁸ If the goods perish after the contract is made, the contract may become void,⁹ but only if the risk has not yet passed to the buyer. In effect this means that there are two possible outcomes if the goods perish after the contract is made: one needs to ask whether the risk of the goods perishing has already passed to the buyer, for if it had, the contract does not become void.¹⁰ This therefore appears to set the law on post-contractual destruction of the goods apart from the basic rule in Section 56(2) of the Contract Act.¹¹

A contract for the sale of goods may be valid even though the price has not been agreed,¹² or a person who was to value the goods and set the price has not done so:¹³ a reasonable price must be paid. This presumably reflects the fact that parties to a contract for the sale of goods do not always clarify these matters in advance, and it would be unhelpful for the law to conclude too frequently that there was no contract, the goods were therefore delivered by mistake, and that they must be returned.¹⁴

Unless excluded by contrary agreement, which is certainly permitted to be done,¹⁵ a contract for the sale of goods will have several terms implied into it as a matter of law, and their content, as well as the question whether their breach allows the buyer to put an end to the contract or leaves him with the right to sue for compensation for breach as his only remedy, is answered by the 1930 Act. In this respect the Act is more explicit than the Contract Act about the basis on which, and circumstances in which, a term will be implied into a contract which falls within the scope of the Sale of Goods Act; it is also much more explicit in setting out the kinds of breach which allow the buyer to rescind (that is, to put an end to, or in the language here used, to 'treat as repudiated') the contract of sale.¹⁶ It is in the Sale of Goods Act that the language of 'condition' and 'warranty' is used as a key to the consequences of

³ Sale of Goods Act, ss 12-13.

⁴ Sale of Goods Act, s 60.

⁵ Sale of Goods Act, s 2(6), s 2(7). Either may form the subject of the contract of sale: s 6.

⁶ Sale of Goods Act, s 4.

⁷ Sale of Goods Act, s 5.

⁸ Sale of Goods Act, s 7, which corresponds very closely to Contract Act ss 20 and 56(1).

⁹ Sale of Goods Act, s 8, which would correspond to Contract Act s 56(2).

¹⁰ On this, see Sale of Goods Act, s 26.

¹¹ Sale of Goods Act, s 8. There is an analogy to be drawn with *Ab Htaung v Union of Burma* (1957) BLR 122 (HC).

¹² A reasonable price must be paid: Sale of Goods Act, s 9.

¹³ If the goods have been delivered to and taken by the buyer, a reasonable price must be paid, though if they have not been delivered the contract is void: Sale of Goods Act, s 10.

¹⁴ Contract Act, s 72.

¹⁵ Sale of Goods Act, s 62.

¹⁶ See Sale of Goods Act, ss 12-17

non-performance, and it is this categorisation of contract terms which might be generalised to make the ordinary law of contract clearer.¹⁷

Detailed rules specify the point at which property in the goods passes from the seller to the buyer: their detailed nature reflects the variety of goods and of contracts for their sale and purchase.¹⁸ It is characteristic of the contract for sale and purchase of goods that property in the goods may pass to the buyer before physical delivery takes place; but at this point we have moved from the main law of contract into the realm of property, so we will say no more about it.

It is also characteristic of the law of sale that a contract for the sale of goods may be made by someone who is not the owner and who is not authorised by the owner to sell them, and this creates a problem for which the Sale of Goods Act provides a practical solution. So far as the transfer of title is concerned, the general rule is that the buyer obtains the title which the seller had, so that if the seller was not the owner or authorised by the owner, the buyer will not get a good title: *nemo dat quod non habet*.¹⁹ But there are certain exceptions, the justification for which is that in some cases at least, a buyer in good faith may assume – because she really cannot be expected to check or to discover the truth if she tries to check – that the seller had title; when these exceptions apply, the buyer will obtain a better title than the seller had to sell.²⁰ The position of a buyer, who cannot easily check or confirm that the seller has a good title to pass, would be even more difficult than it actually is if there were no exceptions to the *nemo dat* rule. For the true state of ownership of goods is often impossible for a buyer to discover: there is no register, for example, and even documents which purport to evidence ownership may not be genuine or current.

The particular rules on performance of the obligations of the parties are set out in detail in the Act.²¹ Their content is generally consistent with the provisions setting out the duty to perform in the Contract Act, but it is much better to have specific provisions which provide, in the absence of express provision in the contract, when and where each party must perform their obligations under the contract, including the right of the buyer to reject the goods in specified circumstances. The rights of the unpaid seller to retain possession of the goods, or to stop them in transit, have no counterpart in the Contract Act, but are an important part of the practical balancing of rights in the Sale of Goods Act.²²

So far as remedies are concerned, where the price is due (because delivery has taken place, or because the agreed date for payment has passed), the unpaid seller may sue for the price. This is not a suit for damages, potentially subject to certain restrictions (such as the obligation to mitigate losses by taking reasonable steps to ameliorate the loss), but a suit for an order that the price which should have been paid be now paid.²³ Where the buyer wrongly refuses to accept the goods or to pay

¹⁷ Compare Sale of Goods Act, s 12, with Contract Act, s 39.

¹⁸ Sale of Goods Act, ss 18-25.

¹⁹ 'No person can give that which he does not have': see Sale of Goods Act, s 27.

²⁰ Sale of Goods Act, ss 27-30. We saw the practical significance of Section 29 (seller with voidable title) in Chapter 4.

²¹ Sale of Goods Act, ss 31-44.

²² Sale of Goods Act, ss 45-54.

²³ Sale of Goods Act, ss 55-56. The word 'price' applies to contracts for the sale of goods; it does not apply to – and this rule obviously does not apply to – a fee payable in return for the provision of services.

for them, the seller may sue for damages for non-acceptance,²⁴ though here the usual rules which expect that the seller will make sensible arrangements to sell the goods elsewhere may be expected to apply. Otherwise, the buyer's remedy for the seller's breach of warranty is damages;²⁵ if the contract is repudiated before performance, the other party may wait until the date of performance and claim damages, or 'treat the contract as rescinded and sue for damages for the breach'.²⁶

All this shows us that the contract for the sale and purchase of goods is a special contract. To the extent that it regulates questions of title, property, the right to possession (including the right to retain and recover possession) it belongs more naturally to a study of the law of property; and insofar as it deals with the rights and obligations of the parties it gives answers which could frequently have been derived from the general provisions of the Contract Act. But it has long been understood that the contract for the sale and purchase of goods has a separate importance, and the rules now found in the Sale of Goods Act 1930 define that separateness.

11.2 Indemnity and guarantee

Contracts of indemnity and contracts of guarantee (or, in some contexts, suretyship) are formed as ordinary contracts; what makes them suitable for the separate treatment given by the Contract Act (in Sections 124 to 147) is the nature and extent of the rights and obligations which they create and, in the case of guarantees, the variation of the terms of the initial relationship between principal debtor and creditor.

A contract of indemnity is one by which one party promises to save the other from loss caused to the other by the promisor himself or by a third party.²⁷ The only thing that the Contract Act has to say about them is to specify the extent of what the indemnified promisee can recover from the indemnifying promisor: in principle this is all sums paid in response to the claim (including sums paid to compromise it) together with costs reasonably incurred.²⁸ That is the extent of the special provisions of the Act as they apply to contracts of indemnity;²⁹ all other issues will be governed by the general principles of the Act.

The relationships created and regulated by a contract of guarantee are more complex, and the special provisions of the Act are mostly concerned with the issues which arise by reason of there being two contracts (between creditor and principal debtor; between creditor and surety) and the problem of one relationship being altered without the involvement of the third party to that relationship. For the most part, the law is rather technical and does not here require close attention.

²⁴ Sale of Goods Act, s 57. But if the plaintiff applies for it, the court may decree specific performance of the promise to accept and pay for the goods: s 58.

²⁵ Sale of Goods Act, s 59.

²⁶ Sale of Goods Act, s 60. Compare this with Contract Act s 39.

²⁷ Contract Act, s 124. In modern American parlance, one might call this a promise to 'hold him harmless'.

²⁸ Contract Act, s 125.

²⁹ Though see Contract Act, s 145, for the implied promise of indemnity which is implied into every contract of guarantee.

A contract of guarantee is one by which a promisor (the surety) undertakes to the promisee (the creditor) to perform the promise made by a third party (the principal debtor) in the event of his default, or to discharge the liability of the principal debtor in the event of his default.³⁰ A contract of guarantee is a contract, and therefore requires consideration. This is usually satisfied by anything done for the benefit of the principal debtor: a guarantee given in return for that is given for consideration. It is otherwise if a 'surety' promises to guarantee an existing debt. Unless some consideration is given for the promise, such as an extension of time for the principal debtor to repay, the promise is unsupported by consideration and the 'surety' is not bound by it.³¹ If obtained by misrepresentation or material non-disclosure by the creditor, the guarantee is invalid.³²

The liability of the surety is co-extensive with that of the principal debtor,³³ but if the contract between creditor and principal debtor is varied without the surety's consent, the surety is discharged in respect of transactions subsequent to the variation:³⁴ this is really just a common-sense application of the general contractual principle that two parties cannot impose obligations on another without the consent of that other. If the creditor agrees to release the principal debtor, the surety is also released, for if the promise whose performance he has guaranteed ceases to exist, there is nothing for the surety to guarantee;³⁵ but mere forbearance for the time being to sue the principal debtor does not automatically release the surety, for in these circumstances the principal debt remains in force.³⁶

If the surety is called on by the creditor to perform, and does perform, he acquires all the rights which the creditor had against the principal debtor. The Act speaks of his being 'invested with' these rights; in other areas of the law this process may be referred to as 'subrogation', but it all comes to the same thing; if the principal debtor does not pay the creditor, and the debt is discharged by the performance of the surety, he would be unjustly enriched at the surety's expense; and to prevent this, the surety, in effect, takes over the role of creditor.³⁷ In fact, he is entitled to sue the principal debtor not just for the debt whose right to recovery has been invested in him, but for his costs as well, on the basis of the implied promise to indemnify the surety which is implied into every guarantee.³⁸

All this shows us that the contract of indemnity and the contract of guarantee, though to some degree special, require little more to explain them than the application of general contractual principles.

11.3 Bailment

The principal reason for the separate treatment of bailment in the Contract Act (in Sections 148 to 181) is that the law of bailment concerns a mixture of obligations

³⁰ Contract Act, s 126.

³¹ Contract Act, s 127. This corresponds to ss 10 and 25 of the Contract Act.

³² Contract Act, ss 142, 143. This corresponds to ss 17-19 of the Contract Act.

³³ Contract Act, s 128.

³⁴ Contract Act, s 133.

³⁵ Contract Act, s 134.

³⁶ Contract Act, s 137.

³⁷ Contract Act, s 140. This corresponds to ss 69, 70 of the Contract Act.

³⁸ Contract Act, s 145.

and property law;³⁹ it also raises, and requires answers to, questions which may not be answered by simple application of the general provisions of the Contract Act.

According to the Act, bailment is the delivery of goods by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.⁴⁰ In other words, the Act sees bailment as resting on contract.

The most obvious example of bailment will be the contract of letting and hiring. But bailment may also take the form of a lending and borrowing goods, which does not normally require consideration,⁴¹ and is not as obviously a contractual relationship as that of letting and hiring. Though the borrower owes obligations of care in relation to the goods, and though the existence of these may satisfy any requirement of consideration sufficiently to bring the relationship within the general definition of bailment set out above, it is clear that gratuitous lending and borrowing does fall within the scope of these provisions; so also does the relationship between the finder of goods and their owner.⁴² It is clear that, although all are covered by the Act, some bailments are more contractual in their origins than others.

The bailor has a duty to disclose faults in the goods of which he is aware,⁴³ and the bailee is under an obligation to take as much care of the goods as would be taken by an ordinary man of prudence in respect of his own goods, and is not responsible for any deterioration in the goods if he has done so.⁴⁴ The bailee is certainly not entitled to say that he subjected the bailed goods to the same casual misuse as he applies to his own goods, even if that happens to be true. Moreover, if the bailee acts inconsistently with the conditions of the bailment, the contract of bailment may be terminated by the bailor;⁴⁵ and the bailor may also sue for compensation for any damage done to the goods.⁴⁶ When the period or purpose of the bailment has expired, the bailee is duty bound to return the goods, even though the bailor has not demanded the return; if he fails to do so he is now strictly responsible for any subsequent loss, destruction or deterioration in the goods, and the question of whether he took care of them does not arise.⁴⁷

Certain classes of person have a statutory right to retain goods bailed to them until they have been paid for services rendered to the bailor: the most important of these is the repairer of the goods.⁴⁸

The particular case of bailment of goods by way of security for payment of a debt is dealt with specifically: in this context, the bailment is referred to as a 'pledge'; the

³⁹ For example, the manner in which mixing the bailed goods with other goods may result in loss of the bailor's title: see Contract Act, ss 155-157.

⁴⁰ Contract Act, s 148.

⁴¹ See for example Contract Act, s 159 (and s 162). In such a case, the lender may require the return of the goods sooner than had been agreed.

⁴² Contract Act, ss 71 (finder becomes bailee, and is responsible as such, when he takes the goods into his custody) 168, and 169.

⁴³ Contract Act, s 150.

⁴⁴ Contract Act, ss 151, 152.

⁴⁵ Contract Act, s 153. In fact, the section speaks of the contract being voidable, but it is 'voidable in the sense of putting an end to the contract', not avoiding it as though the bailor's consent were not free: compare s 39 of the Contract Act.

⁴⁶ Contract Act, s 154.

⁴⁷ Contract Act, ss 160-163.

⁴⁸ Contract Act, s 170. For the others, see s 171.

bailor as the 'pawnee', and the bailee the 'pawnee'.⁴⁹ The pawnee is entitled to retain the goods until repayment of the debt, together with interest and necessary expenses. If the debt is not duly paid the pawnee may sue the pawnee on the debt, retaining the goods as security, or may sell the goods upon notification to the pawnee (and if the sale does not discharge the whole of the debt, he may sue for the balance). The pawnee may redeem the goods at any time before the sale, but must pay any additional expenses incurred by his default. And if the pawnee obtained the goods under a voidable contract, and this contract has not been rescinded at the time of the pledge, the pawnee acquires good title if he took the goods in good faith.

All this shows us that the 'bailment upon a contract' is a rather unusual form of contract. If gratuitous bailment, and bailment by finding and taking into custody, are treated and regulated as bailments, it suggests that the words 'upon a contract', as used in Section 148, are given a relaxed meaning. It may be better to understand bailment as being based on a contract or as arising as a matter of law in other situations where a person is voluntarily in possession of another's goods (including the finder of lost goods); but it is pretty clear that a number of the answers required by questions concerning the nature and content of bailment could not have been derived from the general provisions of the Contract Act.

11.4 Agency

The relationship of principal and agent may be created by a contract, but this is not necessary. Agents can do all manner of things for their principal, but the one with which we will be mainly concerned is the making of contracts. The contract which an agent makes on behalf of his principal may bind the principal to the third party, but it may also enmesh the agent in the contractual relationship. Agency may create contracts when the agent is authorised in advance and the third party knows the person he is dealing with to be agent for another: these cases are rarely controversial. But contracts may be negotiated and concluded when the agent has not been authorised in advance, and in circumstances in which the third party has no way of knowing whether or to what extent the agent has authority.

All these problems and many more arise when business is done by employing agents to do it; and the problems require practical solutions. These could not possibly be derived from the general provisions of the Contract Act; the result is that a statutory code for the creation, consequences, effect and termination of agency is given in Sections 182 to 238 of the Contract Act. For the full detail of the law the reader will need to consult the Act, as well as the decisions of Myanmar courts on it. The aim of this section of the book is to paint the picture of the law of agency with a rather broader brush.

(a) The relationship between principal and agent

According to the Act, an 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is

⁴⁹ Contract Act, ss 172-179.

done, or who is represented, is called the 'principal'.⁵⁰ No consideration is necessary to create an agency;⁵¹ and the authority of an agent may be express (that is, given by words) or implied (that is, inferred from the circumstances of the case).⁵² An agent who has authority to act has authority to do every lawful thing necessary to do such act; an agent with authority to carry on a business has authority to do every lawful thing necessary for, or usually done in, the conducting of such a business.⁵³

Where acts are done by one person on behalf of another, but without the knowledge or authority of the other, he may (but need not) ratify such acts, with the consequence that the effects then follow as if he had authorised them in advance; ratification may be express or implied from the conduct of the person for whom the acts are done.⁵⁴ But ratification cannot be selective: ratification of an unauthorised act is ratification of the whole of the transaction of which it is a part.⁵⁵

The general rule is that authority and agency may be revoked or terminated by the principal:⁵⁶ this is so even if the principal does so in breach of the contract which established the agency. The agent whose agency is terminated in breach of contract may have a good claim for compensation for losses caused to him by the breach,⁵⁷ if that is what it is, but he cannot 'refuse to be terminated', or any such thing. In this respect, agency is unlike the ordinary law of contract, where it is the innocent party who has the option of putting an end to the contract.⁵⁸ Agency may perhaps be regarded as a relationship which may be created by contract but which operates in some respects independently of it. An agency may be brought to an end by consent or regardless of consent. The agent operates by virtue of the authority of the principal, and that authority may be revoked without the agent's consent. So the agency may be terminated by the principal revoking the agent's authority, or by the agent renouncing the business of the agency,⁵⁹ or by the business of the agency being completed, or by death, insanity or insolvency.⁶⁰ However, and by way of exception, the agency may not be terminated if the agent has an interest in the property which is the subject matter of the agency. If, therefore, the agent has been given authority to sell property and to pay himself out of the proceeds of sale, the agency cannot be revoked before the agent has sold the property and taken his commission.⁶¹ Subject to that point, revocation is effective if it takes place before it has been exercised so as to bind the principal: after that, it is too late.⁶²

The duties which an agent owes to his principal are set out in detail in the Act.⁶³ They may be summarised as compliance with the instructions of the principal, the exercise of skill and diligence, the rendering of proper accounts and payment of the sums due on the account. He may not, without the knowledge of the principal, deal in the business of the agency on his own account rather than on account of the principal, and if the agent transgresses this rule, the principal is entitled to recover

⁵⁰ Contract Act, s 182.

⁵¹ Contract Act, s 185. In other words, it is not necessary that there be a contract to create the agency.

⁵² Contract Act, ss 186, 187. ⁵³ Contract Act, s 188. ⁵⁴ Contract Act, ss 196, 197.

⁵⁵ Contract Act, s 199. ⁵⁶ Contract Act, s 201. ⁵⁷ Contract Act, s 205.

⁵⁸ Contract Act, s 39.

⁵⁹ In either of these cases, revocation may be expressed or implied: Contract Act, s 207.

⁶⁰ Contract Act, s 201. ⁶¹ Contract Act, s 202. ⁶² Contract Act, s 203.

⁶³ Contract Act, ss 211-221.

from him any benefit which may have resulted from the illicit transaction.⁶⁴ Here also the distinction from the ordinary law of contract is plain: in general a court may order compensation for losses actually caused, but in this context the notion of loss is irrelevant, and the court may order the paying over of gains made: no doubt this is justified as being necessary to remove any incentive for the agent to breach his duties to the principal.

The duties of a principal to the agent are to pay the agent in accordance with the terms of the agency agreement: the payment is usually referred to as 'commission', and an unpaid agent has a lien over the principal's property as security for payment.⁶⁵ The principal is bound to indemnify the agent against the consequences of all lawful acts done in the exercise of authority,⁶⁶ but there is no duty to indemnify the agent against the consequences of a criminal act which the agent was employed to do.⁶⁷ The principal must compensate the agent for any injury caused by the principal's neglect or want of skill.⁶⁸

(b) Effect of agency when contracts made with third persons

The basic rule, as everyone will intuitively know, is that contracts made through an agent, and obligations arising from acts done by an agent, can be enforced and have the same legal consequences as if they had been made and done by the principal in person:⁶⁹ the whole point of dealing with a person's agent is to be in a relationship with that person. The problems arise when the agent goes beyond the scope or limits of his authority. If the things he does can be separated, the principal is liable on those falling within the authority but not on the others;⁷⁰ if they are inseparable or indivisible the principal is not bound to recognise the transaction,⁷¹ though he may of course ratify it.⁷²

Unless the contract otherwise provides, the agent can neither enforce nor be liable on the contract entered into on behalf of the principal: he is, after all, just the facilitator, not the party. But it is presumed that the agent can sue and be sued if the contract is for the sale and purchase of goods for a merchant residing overseas, and also where the agent does not disclose the name of his principal, and also where the principal, though disclosed, cannot be sued.⁷³ The justification for this rule is simple pragmatism, and is none the worse for that. Where an agent makes a contract with a person who has no reason to suppose that he is dealing with an agent, his principal (the so-called 'undisclosed principal') may require performance of the contract, but the other contracting party has against the principal the same rights which he would have had against the agent.⁷⁴

A person who represents untruthfully that he is the authorised agent of another, and by doing so induces the third person to deal with him, is liable, if the principal or alleged principal does not ratify his acts, to pay compensation for any loss or

⁶⁴ Contract Act, s 216.

⁶⁵ Contract Act, s 221.

⁶⁶ Contract Act, s 222; so also if the agent does an act in good faith but which injures another: s 223.

⁶⁷ Contract Act, s 224.

⁶⁸ Contract Act, s 225.

⁶⁹ Contract Act, s 226.

⁷⁰ Contract Act, s 227.

⁷¹ Contract Act, s 228.

⁷² Contract Act, s 196.

⁷³ Contract Act, s 230.

⁷⁴ Contract Act, s 231.

damage to the third person.⁷⁵ It is as though he promised that he had authority, and is liable to the promisee when this proves to be false and loss results.⁷⁶ And misrepresentation or fraud committed by agents acting in the course of their business for their principals has the same effect as if committed by their principals; however, such wrongs do not affect the principal if the agent was not acting within the course of his authority.⁷⁷ Finally, for the purposes of this account, if a principal, by words or conduct, holds out an agent as having his actual authority when he does not have it, the principal is bound by the obligation undertaken by the agent:⁷⁸ this may be thought of as ‘agency by holding out’. It serves to remind us that it must be the principal, not the agent, who does the holding out: it is not enough that the agent asserts that he has the authority of the principal.⁷⁹

All this shows us that agency, for all that it is encountered in everyday transactions, is a highly complex legal structure, and that the problems which arise are many and varied.

11.5 Partnership

Traditionally studied as part of a course on business organisations, and covered by the Partnership Act 1932, partnership was originally dealt with by the Contract Act. As it plays a significant part in commercial life in Myanmar, its main principles are conveniently summarised here.

Partnership is the relationship between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.⁸⁰ The individual members are partners, and collectively they form a firm. Partnership is a contractual relationship, and it is in that respect, and others, different from a Hindu undivided family carrying on the family business as such, where the status of coparcener arises at birth, not by contract on having attained the age of majority⁸¹ as is the case with a partnership.⁸² The Act states that whether a group of individuals is a partnership is a matter to be decided by looking at all the evidence: there are, after all, cases where two persons are interested in a property – say as joint tenants – but are not partners in a firm.⁸³

The duty of partners to each other is to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, to keep accounts, and to disclose information.⁸⁴ Otherwise the terms of the partnership may be established by contract, and that contract may provide that a partner shall, while a partner, carry on only the business of the firm.⁸⁵ The default rules regulating the

⁷⁵ Contract Act, s 235.

⁷⁶ In some systems this cause of action is seen as ‘breach of warranty of authority’.

⁷⁷ Contract Act, s 238. ⁷⁸ Contract Act, s 237.

⁷⁹ Though the agent may incur personal liability under Contract Act, s 235.

⁸⁰ Partnership Act, s 4.

⁸¹ Partnership Act, s 30 provides that a minor may not be a partner, but with the consent of the partners he may be admitted to the benefits of partnership.

⁸² Partnership Act, s 5.

⁸³ Partnership Act, s 6.

⁸⁴ Partnership Act, s 9.

⁸⁵ Partnership Act, s 11. To this extent Contract Act s 27 is overridden.

governance of the partnership and the organisation of the business of the firm may be varied by contract, but the starting position is one of equality of participation,⁸⁶ interest, reward and responsibility. A partner is not remunerated for participation in the business of the firm, but the partners may draw profits from (and are bound to contribute equally to the losses incurred by) the firm.⁸⁷ However, the law allows considerable freedom for the partners to specify for themselves the manner in which the partnership is structured. It is when the parties to the contract may have departed too far from the basic idea of a partnership as defined in Section 4 of the 1932 Act that the test in Section 6, of looking at the true relationship in the light of all the factors, will be required.

So far as relations with third parties are concerned, a partner is an agent for the firm in relation to the business of the firm.⁸⁸ The act of a partner, done to carry on, in the usual way, the business of the firm, binds the firm: the authority in this case is his implied authority.⁸⁹ Although the partners can vary the authority of partners by contract, a person dealing with a partner, who appears to have implied authority, may assume that the partner does have authority unless he knows of the restriction which the partners have placed on it.⁹⁰ Every partner is liable for the acts of the partnership while he was a partner: the liability is joint with all the partners, *and* several, which is to say, he is individually liable;⁹¹ and liability is unlimited. The firm is liable for wrongs committed by partners, and for the misappropriation of funds by a partner.⁹²

A person joins the partnership only with the consent of all the partners unless they have by contract adopted a different rule; he does not become liable for acts done before the date of his admission to partnership.⁹³ He may retire from the partnership with the consent of all the partners or in accordance with an express agreement; but his liability for acts done while he was a partner does not cease unless there is an agreement between him, the remaining partners and the third party who has a claim:⁹⁴ this must be a pretty rare event. A partner may not be expelled from the partnership unless the contract gives the partnership that right and the power of expulsion is exercised in good faith.⁹⁵ Limitations on the power of an outgoing partner to use the firm's name are stated in the Act; it is also provided that an agreement may be made restraining the outgoing partner's freedom to compete in similar business.⁹⁶

A firm may be dissolved by the partners in various circumstances,⁹⁷ or by the court.⁹⁸ When the firm is dissolved, each partner is entitled to have the property of the firm applied to pay the debts and liabilities of the firm, and for the surplus to be distributed according to their rights.⁹⁹ The Act contains detailed provisions for the winding down and winding up of a partnership.¹⁰⁰

⁸⁶ Partnership Act, s 12.

⁸⁷ Partnership Act, s 13.

⁸⁸ Partnership Act, s 18.

⁸⁹ Partnership Act, s 19, which goes on to list certain acts presumed not to be within the authority of a partner.

⁹⁰ Partnership Act, s 20.

⁹¹ Partnership Act, s 25.

⁹² Partnership Act, ss 26, 27.

⁹³ Partnership Act, s 31.

⁹⁴ Partnership Act, s 32.

⁹⁵ Partnership Act, s 33.

⁹⁶ Partnership Act, s 36. To this extent Contract Act s 27 is overridden.

⁹⁷ Partnership Act, ss 39-43.

⁹⁸ Partnership Act, s 44.

⁹⁹ Partnership Act, s 46.

¹⁰⁰ Partnership Act, ss 48-55.

All this shows us that partnership is a highly complex legal structure, and that the problems which arise are many and varied. Though the Partnership Act leaves the individuals who form a partnership firm considerable latitude in settling the terms of their relationship with each other, the relationship with those outside the partnership is not as susceptible to this adjustment, for it would be unacceptable for the rights of those who deal with partners or with a firm to be reduced beyond what is prescribed by the Act.

In terms of the general law of contract, although partnership rests on contract, most of the incidents of partnership are laid down in the statute and are in that sense imposed on the parties. The general law of contract has a relatively small role to play.

12

Reform of Contract Law

Minor, but not structural, reform of the Contract Act

The nature of law reform depends on the nature of the law being reformed. In Myanmar, since 2009, the pace of legislative change has been rapid, with a number of laws which had outlived their usefulness being removed from the books. In some areas it may well have been necessary to create entirely new, and sometimes complex, law from scratch: the laws on foreign investment did not exist in any recognisable form until the last few years. In some others it made sense to bring the law of Myanmar into line with what may be regarded as an international standard: the law on international arbitration adopted in 2016 was made to reflect very closely the model law agreed on by the United Nations, and its incorporation into Myanmar law made sense from every point of view.

In some areas there appears to have been a desire for law reform, but with results which are more questionable. The Companies Act 1914 had been little amended in the hundred years of its life, and provided the legal basis for the law of companies and corporations in Myanmar. The idea that it needed to be completely replaced by a new statute was debatable, though it was not clear that it was much debated. It was certainly true that legislation was required for kinds of corporate body which had not previously existed in Myanmar law, but this could have been adopted alongside the 1914 Act. Instead, it seems, the whole of the well-established and familiar law is to be cast aside, and a new text, which did not evolve from the legal system in which it is to operate, is to be adopted. One can only imagine the problems which this will create, and the expense and confusion which seem certain to follow.

The Contract Act 1872 is almost 150 years old. It is, as we have said, a fine piece of legislation; and it appears to be well understood by lawyers in Myanmar. If inspiration is required from outside Myanmar to see how it may deal with problems of a kind which have not yet arisen before a court in Myanmar, there is some material available from India and Malaysia in particular, where the discussion and analysis of the text has generated much heat and some light. But the Contract Act 1872 is also part of the wider family of the common law, and where it leads or runs into difficulty it is likely that the general principles of the common law (which is to say, well-established ideas from other common law jurisdictions) are on hand to point the way to a better answer. As the Contract Act is probably the piece of Myanmar legislation

which is best known to lawyers (and others) in Myanmar, it would make no sense at all to undertake radical reform, or to start again with a blank sheet of paper.

This is not to suggest that there are no gaps, or uncertainties, in Myanmar contract law. On the contrary, it is inevitable that an Act that is nearly 150 years old on an area vital to everyday commerce will have gaps and will require some progressive interpretation by the courts if it is to remain relevant. We have suggested at various stages throughout the above chapters that the Myanmar courts could use the general provision of section 13(3) of the Burma Code, which talks of the law reflecting ‘justice, equity and good conscience’, to fill in gaps. And those gaps could most sensibly be filled by reference to the modern law of contract as developed in other common law jurisdictions.

An alternative strategy would be to reform the Contract Act so as to fill in those gaps legislatively. One might strongly argue that, as the tradition in Myanmar is to have the law of contract in a legislative code, this would be the preferable approach. Not only could gaps be filled by adding new sections to the 1872 Act but the opportunity could be taken to iron out any difficulties caused by the way in which certain provisions were drafted in the 1872 Act.

Of these two approaches we would tend to favour the latter. However, it is our firm view that any legislative reform should be limited and conservative. By and large the 1872 Act works well and it would be wholly inappropriate to think that one should start again. Only really necessary reform should, in our view, be considered.

What we seek to do in this chapter, therefore, is to highlight what we consider the areas where legislative reform of the 1872 Act would be beneficial. This primarily comprises drawing together suggestions we have made in previous chapters as to where there are significant gaps or major uncertainties. In some cases, the proposals are based on the view that the rule contained in the Act needs to be altered in the light of experience and the change in conditions over the last 140 years; in a small number of others, the proposal is that the Act be amended to make clear and express what it probably means but does not declare as clearly as it might: amendment for the avoidance of doubt.

We make our proposals for amendment of the text of the Act, in the order in which they would appear in the Act, under ten points, which are as follows:

1. Implied promises or terms;
2. The interpretation of contracts;
3. Consent caused by coercion;
4. Agreements in restraint of trade;
5. Unfair exemption clauses;
6. Rights of third parties;
7. Classifying terms as conditions, warranties, and innominate terms;
8. Contracts which become void by rescission;
9. Restitution of unjust enrichment;
10. Compensation for breach causing non-financial loss.

12.1 Implied promises or terms

We observed in Chapter 5 above that Section 9 appeared to assume the existence of the rule that promises or terms of a contract could be implied, for it defined them as promises not made in words. However, this may be thought to be an insecure or insufficient basis for it to be said, positively and clearly, that the Act allows terms to be implied into a contract; and it offers no guidance as to the test which a court should apply when it is asked to find that a term should be implied into a contract.

It is suggested that Section 9 of the Act be amended to read as follows:¹

9. Promises, express and implied.

- (1) A promise may be express or implied.
- (2) In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.
- (3) Except where there is an express term of the contract which prevents it, a term may be implied into a contract where:
 - (a) it is required by statute or by the type of contract or relationship in question, or
 - (b) it is obvious that the parties agreed to it, or
 - (c) it is necessary to do so for reasons of business efficacy, or
 - (d) it is consistent with any usage or custom of trade.
- (4) Subsection (3) is without prejudice to the Evidence Act 1872.

12.2 The interpretation of contracts

In Chapter 5 we also observed that the rules or principles by which a court ascertains the meaning of the terms of a contract are not to be found in the Act at all; and if it is correct, as it appears to be, that this is one of the most usual tasks of the judge trying a contractual dispute, it may be helpful if the Act contained a rule, or principles to be taken into account, when the task is undertaken. This would extend to answering the tricky question whether a court is permitted to pay attention to the record of negotiation prior to the agreement on terms. The fundamental importance of the law on interpretation leads us to suppose that the law should be made clear right at the outset.

It is suggested that a new Section 9A be inserted after Section 9.

9A. Interpretation of a contract. The correct approach to interpreting a term of a contract is to consider the natural and ordinary meaning of the words used and to ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made.

¹ We have included Section 1(3)(d) because it seems that the saving, in Section 1 of the Contract Act, for 'any usage or custom of trade' that is not inconsistent with the rest of the Act, is most obviously dealt with by implied terms incorporating that usage or custom.

12.3 Consent caused by coercion

It was observed in Chapter 4 that where consent to a contract is caused by illegitimate pressure which is non-criminal and economic – such as the threat to break a contract – rather than penal² or concerned with personal harm, there is reason to allow the party whose consent was so caused to have an option to avoid the contract. Yet if one contracting party threatens the other that he will break a contract unless the other agrees, for example, to accept a smaller sum of money than the contract provided for, or agreed, for example, to perform work or services which go beyond that provided for in the contract, the consent to the new agreement, if made, may have been brought about by the wrongful application of pressure which, though not criminal, is still contrary to law, albeit civil law. In those circumstances one may fairly ask why such wrongful application of pressure should not count as coercion. It may be that it should be treated separately as ‘economic coercion’, and treated alongside the examples of coercion which are currently provided for by Section 15.

It may be expected that this kind of thing will arise as a problem more and more frequently as where, for example, a key employee threatens to break his contract of employment unless the employer adjusts the terms of the contract of employment, or a builder threatens to walk off the job at a particularly critical stage in the work, or the company engaged to do work on the IT systems demands more money in return for not leaving the work incomplete and the system unusable. In all these cases the law should say that a contract entered into in these circumstances is voidable. It really should make no difference that the contract whose breach is threatened required performance to a third party. Suppose for example you make a contract with my mother to repair the roof above or the drains beneath her house, but that you threaten to break the contract and walk off the worksite today, which would leave my mother in a terrible position, unless I agree to sell you my car at a low price. In such a case the law should say that the contract with me is voidable, and coercion is the natural place for the applicable principle to be found.

It would be helpful to have it confirmed that a case like this was one in which consent was treated as not free. A suitable test might be that if one party threatens to commit a breach of contract or other civil wrong, and that as a result of this the other agrees to make a new contract, or to vary the terms of an existing contract, the contract so made, or the variation agreed to, is voidable at the option of other party if (1) he considered that he had no practical alternative but to agree, and (2) a reasonable man in the same circumstances would also have considered that he had no practical alternative but to agree.

It is suggested that Section 15 of the Act be amended to read as follows:

15. ‘**Coercion**’ defined. ‘Coercion’ is the committing, or threatening to commit, with the intention of causing any person to enter into an agreement:

² Breach of contract is a crime in the particular circumstances of Section 491 of the Penal Code, where the contract is to attend and supply the wants of a helpless person, but not otherwise. The offence of extortion under Section 383 of the Penal Code also requires a threat of violence to the person.

- (1) any act forbidden by the Penal Code, or
- (2) the unlawful detaining of any property, to the prejudice of any person whatever, or
- (3) a breach of contract in circumstances in which a party had no reasonable alternative to giving in to the threat.

12.4 Agreements in restraint of trade

It was observed in Chapter 3 that it would be advantageous to amend Section 27 of the Act to make better provision for agreements in restraint of trade, particularly – but not only – for the case of the key employee who leaves one employer in order to go to work for a competitor. The provision which has long applied to partnerships, Section 36(2) of the Partnership Act, could be used as the template for the reform of Section 27, to allow for a reasonable restriction after a contract comes to an end of the right to take up employment with a competitor.

It was also observed in Chapter 3 that the law on illegality and public policy was in some respects difficult, particularly in those cases in which a contract which is ordinarily lawful, such as a contract to lend and borrow money, is entered into by a borrower who intends to use the money for an illegal purpose. In some legal systems the question which is asked is whether the illegal purpose ‘taints’ the contract with which it is associated. The trouble is that, as these legal systems show, it is extremely difficult to find an answer on which most people will agree. It would be absurd if my contract of employment were held to be void just because I intend to keep what I am paid and to avoid paying the tax which is lawfully due; but if I hire a car for the purpose of smuggling goods or people across a border, it is easier to see that the contract of letting and hiring might be thought to be illegal and void. The practical answer may just have to be that the deceptively easy-to-understand statement of the law in Section 23 is as good as any statement can be, and that any attempt to improve it will run the risk of making it worse. We have no proposal to make for it, therefore.

It is suggested that Section 27 of the Act be amended to read as follows:

27. Agreement in restraint of trade void.

- (1) Except as provided by subsection (2), every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
- (2) Such an agreement shall not be void if the party seeking to uphold it shall satisfy the court that the restraint was reasonable having regard to the interests of the parties to the agreement and of the public.

12.5 Unfair exemption clauses

In Chapter 5 we also considered the problem – it is a serious problem, and one which really does need to be addressed – which arises when a court finds (or ought to find) that a term of the contract (other than a penalty clause) is unfair or unreasonable in the way that it reduces or restricts the rights of the weaker party to the contract.

It was explained above that there appears to be no clear basis for a court to act to prevent effect being given to a term in a contract which, if the court were to address the question, it would regard as being unfair. Terms which limit, exclude, or otherwise exempt a contracting party from liability ('exemption clauses') may seem simply unfair.

The approach of the courts in the first twenty years of independence was clear but harsh: if the term was a part of the contract, it would be enforced. It was part of the contract if sufficient notice of it had been given to the plaintiff before the contract was made, because if the plaintiff was not happy with the terms proposed by the other – say the airline – he or she should not have made the contract. Having made the contract on terms which include an objectively unfair term, the passenger would be bound by it. In taking this view, the courts have been placing the freedom of parties to make contracts on whatever terms they liked, above other concerns, such as inequality of bargaining power.

Other common law systems have reconsidered this approach, and have generally moved away from it. Freedom of contract is perhaps more of a slogan and less of a reality when a powerful corporation, or an employer, is in a position to dictate terms to a customer or an employee; and the comment that if they did not like the terms proposed they were free to go elsewhere is not realistic when applied to the typical customer or employee. And if the real objection to the content of the clause is that it is unfair, the response that the parties agreed to it simply misses the point.

In the text it was suggested that if a court had power to reduce the sum fixed by the parties as a penalty in the event of breach, it would make sense for it to have power to increase the sum fixed by the parties as the limit of liability (which figure may be as low as zero) if the contract was breached. It did not seem sufficiently likely that judicial extrapolation from Section 74 would be able to achieve this result, and as a consequence it made more sense for the law to be changed by legislative act. The form of this is not as important as identifying the aims which should guide the reform. But a law which gave a court power to override a term of a contract which was unreasonably and unfairly prejudicial to a consumer (in a contract made with a professional seller or supplier) or to an employee (in a contract made with an employer) or other person in an equivalent position of contractual weakness, would be a good start. It may be that this should form part of a broader review of the law as it applies to consumers in the dealings with professionals, but however it is done it does need to be considered for reform. Our suggested reform is limited to unfair exemption clauses in a consumer contract although one could expand what is here set out to cover all unfair terms.

It is suggested that a new Section 28A be inserted after Section 28:

28A. Unfair exemption clauses void.

- (1) A term in a contract between a consumer and a trader excluding or restricting liability for a breach of contract by the trader is void unless the term satisfies the test of reasonableness.
- (2) The test of reasonableness is whether the term is a fair and reasonable one to have been included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

- (3) For the purposes of subsection (1):
- (a) a consumer is an individual who, in his dealings with a trader, is not acting for the purposes of a trade or business;
 - (b) a trader is a person who makes the contract for purposes relating to his trade or business.

12.6 Rights of third parties

We explained in Chapter 5 how the rule found – and frequently modified by legislation – in some systems of law and labelled privity of contract, that a stranger to a contract may not take advantage of and enforce the contract, is not part of Myanmar law. At least, the courts said so on two occasions prior to independence. Although their judgments were clear, it would be preferable if this very welcome rule were also set out and confirmed in the Act, so that everyone may see it.

It is one thing to say that a non-party, or third party, may enforce a contract to which he was not party. But it is another to explain or define the circumstances in which this is permitted. For example, it does not seem sensible that a stranger to a contract made between others should be able to derive a right to enforce it from the mere fact that he considers that it would benefit him to be able to do so. For example, if my neighbour makes a contract with a drainage contractor for drainage work to be done on the neighbour's land, I may consider that the contract will be beneficial to me as well. It would be most surprising if I were able to sue the drainage contractor if he fails to execute the works in accordance with the precise terms of the contract. To put the point simply, the contract is really none of my business; and if my neighbour is willing to allow the contractor to perform his duties poorly, that is his business, not mine. A statement of the position of third parties which was more explicit would clarify the law and be useful.

It is suggested that a new Section 37A be inserted after Section 37:

37A. Benefits directly conferred on third parties.

- (1) Unless the contract provides otherwise, where the term of a contract directly confers a benefit on an expressly identified third party, the term shall be enforceable by the third party in his own name, subject to any defences which would have been valid between the contracting parties.
- (2) Notwithstanding anything in Sections 62 or 63, where a third party has a right to enforce a term of the contract under subsection (1), and that term has been accepted or relied on by the third party, the parties to the contract cannot extinguish or alter that right without the consent of the third party.

12.7 Classifying terms as conditions, warranties, and innominate terms

It would be helpful if the law were clearer on the criterion, or criteria, which must be satisfied before a party is entitled to rescind (in the sense of put an end to) the contract on the ground that the other has made a sufficient failure in performance.

We examined this in Chapter 7, and though it does not appear to have produced any troublesome decisions in the courts, the question of how substantial the failure to perform has to be does not appear to be specified with sufficient clarity in the Act, and it cannot be easily shown from the reported cases.

One way of looking at the question would be to ask whether the effect of the non-performance is such as to deprive the other party of substantially all of the benefit of the contract: a breach which goes to the root of the contract. Another would be to ask whether the term broken was one which, if breached, would always allow the other to rescind (that is, put an end to) the contract, in the way which is permitted when a stipulation as to time is breached in circumstances in which time was of the essence of the contract. As is reflected in the Sale of Goods Act 1930, but not in the general law of contract in the 1872 Act, terms which always allow an end to be put to the contract are referred to as ‘conditions’, though it is not the label, but the legal effect, which is the important thing. And if one is to recognise conditions generally, the next question would be whether one should go on to accept that most terms are not conditions (or warranties) but are rather ‘innominate’ in relation to which it is the consequences of the breach that determines whether the innocent party is entitled to rescind the contract or not.

It might be said that the Contract Act has worked for a long time without this kind of classification of terms, and that it does not need it now. The trouble with that would be that commercial parties, making contracts of a size and financial importance of a kind not experienced until very recently, may wish to know whether, if they write the terms of their contracts, and the rights and remedies which are and are not available, in a way which suits them, the agreement will be enforceable by the courts. A clarification or an expansion of the basic rule in Section 39, to explain when a party may and may not rescind the contract and to confirm that the parties are in principle free to determine for themselves whether and when this may be done, would clarify and improve the law in a significant but helpful way.

It is suggested that Section 39 be replaced with a new Section 39:

39. Effect of failure or refusal of party to perform the contract.

- (1) Subject to subsection (5), the innocent party has the right to put an end to the contract for breach by the other party in the situations set out in subsection (2).
- (2) The situations referred to in subsection (1) are as follows —
 - (a) there is the breach by the other party of a term that is a condition (rather than being a warranty or an innominate term);
 - (b) there is the breach by the other party of an innominate term and the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit of the contract; or
 - (c) the other party repudiates the contract by making clear to the innocent party, by words or conduct, that it is not going to perform the contract at all.
- (3) For the purposes of subsection (2)(a) and (b) —
 - (a) a term is a condition if it is such an important term of the contract that any breach of it would deprive the innocent party of substantially the whole benefit of the contract or if it is otherwise clear that the intention of the parties is that any breach of it should give the innocent party the right to put an end to the contract;

- (b) a term is a warranty if it is such a minor term of the contract that no breach of it would deprive the innocent party of substantially the whole benefit of the contract;
 - (c) an innominate term is a term that is neither a condition nor a warranty;
 - (d) subject to legislation (for example, the Sale of Goods Act 1930), the intentions of the parties determine whether a term is a condition or a warranty or an innominate term but the fact that the contract refers to the term as a 'condition' is not conclusive.
- (4) The parties may include a term in the contract that provides for putting an end to the contract on an event other than a breach allowing that under subsection (2).
- (5) The innocent party shall not put an end to the contract in accordance with subsection (1) if he has signified, by words or conduct, that he acquiesces in its continuance.

12.8 Contracts which become void by rescission

When a contract is rescinded on the basis that the consent of one of the parties to it was not free, one would expect the law to provide that each party to the contract would be required to restore any benefit or advantage which had been obtained prior to the rescission. We explained in Chapters 4 and 10 above how Section 64 plainly imposed such an obligation on the party who exercised the option to rescind, and expressed our surprise that there was no clearly equivalent obligation on the party against whom the option was exercised. We observed that Section 65 might be taken to impose such obligation, but only if it were accepted that a contract which was rescinded was 'a contract which becomes void', which was debatable. For the avoidance of doubt, therefore, Section 65 should be adjusted so that it is made clear that the party – the non-innocent party – against whom rescission takes place is required to make restitution.

It is suggested that Section 65 be amended to read as follows:

65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void or is rescinded by a party entitled to do so, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

12.9 Restitution for unjust enrichment

In Chapter 10 we examined the way in which the Contract Act provides for payment, in respect of benefits conferred, which we described as 'restitution', when a relationship 'resembling those created by contract' has been created. The courts have had considerable opportunity to explain how this provision works, for one effect of the Japanese invasion of the country in 1942 was that services of various degrees of helpfulness were performed for absentee owners of property, and claims for payment as a result came before the courts on several occasions. Yet it still seems odd to say

that the relationship ‘resembles one created by contract’: if, as in these wartime cases it is plain and obvious that there was no communication, no proposal, no acceptance, no promise, there is nothing to be accompanied by consideration, and the idea that the absentee owner consented, freely or otherwise, to the provision of services is ridiculous: having fled for his life, it cannot be said that he consented to a service of which he knew nothing. How, really, does the relationship in this case resemble one created by a contract? The truth is that it is the very opposite.

One possibility would be that Sections 68 to 72 would benefit from being recast so that they state their principle in terms which are less artificial, and which say, in effect, that where a person has received a benefit from another, in circumstances in which he would be unjustly enriched at the other’s expense if he did not make a payment in respect of it, he may be ordered to make such a payment. This would have several advantages. It would provide a general principle which will apply generally, in place of separate causes of action which do not cover all the ground but leave awkward gaps; and it will mean that the law does not say that there is a resemblance to something which is not there. However, a more modest solution would be to provide a rule to allow recovery in the cases which are not already covered by Sections 68 to 72 but which are based on the same underlying principle. A midway position, which we prefer, is do the latter and also to give interpretative guidance as regards Sections 68-72.

It is suggested, therefore, that two changes be made. First, to establish a common approach to all the cases covered in Sections 68 to 72, it is suggested that a new Section 67A be inserted immediately before Section 68, as part of Chapter V of the Act:

67A. Restitution for unjust enrichment. Sections 68 to 72A of this Act shall be interpreted as recognising that, where a person is unjustly enriched at the expense of another person, the latter has the right to restitution from the former subject to defences (such as the defence of bona fide change of position).

Second, in order to deal with the gaps which may be left by Sections 68 to 72, it is suggested that a new Section 72A be inserted after Section 72:

72A. Restitution by person unjustly enriched in cases not expressly provided for. In any case not falling within the scope of Sections 68 to 72, where there is no contract, but a person is unjustly enriched at the expense of another person, the latter has the right to restitution from the former subject to defences (such as the defence of bona fide change of position).

12.10 Compensation for breach causing non-financial loss

In Chapter 8 we looked at compensation for breach of contract, and as we went through the principles and the cases we observed that there were a number of questions which may be asked but to which the answer is not clear. For example, the rules which govern the recovery of compensation when a loss or an event is, and was known to or foreseen by the parties as a consequence of the initial loss – the lost

profits on resale of the goods, or on making the goods into a product which will then be sold – are not as clear as they should be. In some cases it is easy enough to say to the plaintiff: ‘you should have gone to market that same afternoon and obtained replacement supplies’, or ‘you should have gone to market that same day and sold the goods to someone else’, and to reason that everything which resulted from his not having done so was not caused by the breach of contract but by the failure of the plaintiff to behave as he should have done. But in many cases it is not as simple as that: not all contracts are about the sale and purchase of goods for which there is a ready market, and for these cases perhaps a clearer statement of the consequential losses which can, and which cannot, be recovered for would be helpful.

We also observed that the question of whether damages could be recovered for losses which may be described as responding to distress or anxiety, or perhaps to loss of reputation, should be reconsidered. It appears that the law requires and expects those who suffer such a reaction when a contract is broken to just put up with it: but why? Nobody has the right to a happy or tranquil life, not least because there is no-one who owes a legal duty to ensure that they have it. Yet that is not quite the point. When I make a contract with another person, I have – I have purchased, if you prefer – the right to the performance of that promise. As far as the law is concerned, if the agreement is not illegal or contrary to public policy, if I am not in the position I would have been in if the contract had been performed, the performance has fallen short of the promise. Suppose I arrange to take my parents to a hotel for an anniversary holiday, or my boss and his wife for a meal at a fine restaurant, or ask a surveyor to confirm that the house I propose to buy is sound; and suppose that the other party fails to deliver. It is obvious that what I have lost, or think I have lost, is not just the value of the thing I bought; I suffer shame and humiliation before those whom I had sought to honour; I suffer anxiety and distress and sleeplessness as I worry that my newly-purchased house is liable to fall down in the middle of the night. If the law of contract ignores this, and tells me that I just have to put up with it, it does two things: it tells me that I am not entitled to be put – however imprecisely it may be that this is measured – in the position which I would have been in if the contract had been performed; and it tells the other party that he can do this and get away with it. This does not appear to be satisfactory.

It is suggested that a second Explanation be added to Section 73, as follows:

Explanation: If the claimant is an individual who suffers a non-pecuniary loss as a result of the breach, compensation may be awarded for that loss if —

- (a) if it comprises loss of satisfaction (such as enjoyment or peace of mind) or distress and it was an important object of the contract that the claimant should have satisfaction or should not suffer distress;
- (b) if it comprises physical inconvenience or discomfort or distress consequent on that inconvenience or discomfort; or
- (c) if it comprises pain, suffering or loss of amenity consequent on the claimant’s personal injury.

APPENDIX I

The History and Drafting of the Myanmar Contract Act 1872

With the exception of a few minor factual changes in its illustrations, the Myanmar Contract Act¹ (which is conventionally dated 1872 but was given official force in Burma from 1897-8) is identical to the Indian Contract Act 1872.² This is precisely because its enactment in Burma represented the application of the law in India to that part of India that, from 1897, included the province of Burma.³ India, including Burma, was at that time ruled by the British. The Indian Contract Act 1872, in effect, represented a statutory codification of the English law of contract.

It follows, therefore, that in looking in a little more detail at the history of Myanmar's contract law, one must begin with India. It is to that task that **Section A** turns. **Section B** then considers the circumstances in which the Indian Act came to be applied to Burma/Myanmar.

(A) The Indian Contract Act 1872

1. Contract Law in India before the 1872 Act

Historically, different sections of the Indian population were governed by distinct bodies of contract law.⁴ Many of them were based on religion. For example, the Muslim law of contract was administered by the Mughal kings in the territories under their control. Simultaneously, the Hindu law of contract applied in some other parts of India.⁵

The advent of the British rule in India complicated things further. In colonial India, the law and procedure in the three Presidency towns—Calcutta, Madras and Bombay—were vastly different from the rest of the country.⁶ In the Presidency towns, Hindus and Muslims were governed by their respective laws of contract. When only one of the parties was a Hindu or a Muslim, the law of the defendant prevailed.⁷ In other cases, for example, when the parties were

¹ This Act is contained in vol IX, part XI of The Burma Code, otherwise known as the Burma Laws Act 1898.

² Act IX of 1872 (India). The Contract Act 1872 has also been adopted in, for example, Bangladesh, Brunei, Malaysia, Pakistan and Tanzania.

³ See point (B) below.

⁴ Bernard S Cohn, 'From Indian Status to British Contract' (1961) 21 *Journal of Economic History* 613, 614; Warren Swain, 'Contract codification and the English: some observations from the Indian Contract Act 1872' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (CUP 2013) 178.

⁵ Atul Chandra Patra, 'Historical Background of the Indian Contract Act, 1872' (1962) 4 *Journal of the Indian Law Institute* 373, 373.

⁶ *ibid* 379.

⁷ Act of Settlement 1781 (India), s 17 cited in MP Jain, *Outlines of Indian Legal History* (2nd edn, NM Tripathi 1966) 547. See also, Joseph Minattur, 'Indian Contract Act 1872: Its Wanderlust and Warmer Climes' (1972) (Special Issue) *Journal of the Indian Law Institute* 107, 108.

not Indian, it was assumed that English law would apply.⁸ In the *mofussils* i.e. regions outside the Presidency towns, contract cases were decided according to ‘justice, equity and good conscience’.⁹ However, this phrase often became a gateway for the application of English rules.¹⁰

The previous paragraph may convey the impression that the contract law in British India before the 1872 Act was a complicated maze of legal rules. In practice however, the position was far simpler. With minor exceptions,¹¹ most cases were decided according to English law.¹² Upon a comprehensive analysis of the case law from this period, Dr Tofaris has demonstrated that indigenous law played a very limited role in contract disputes.¹³ This also derives support from Sir Francis Macnaghten’s remarks in his 19th century treatise on Hindu law:¹⁴

‘Although it is declared by statute, that all matters of contract and dealing, between party and party, shall be determined in the case of *Hindoos*, by the laws and usages of *Hindoos*, I never knew, or heard of, an instance in which the Supreme Court was called upon in a case of contract, to decide by such laws and usages.’

It was against this backdrop that the codification of substantive law in India was first mooted. Interestingly, the theoretical heterogeneity of the Indian legal rules,¹⁵ and their practical convergence resulting in the application of English law¹⁶ were both used as arguments in favour of codification. Thus, on the one hand, a Government despatch to the Secretary of State for India noted:¹⁷

‘We feel that the reduction to a clear, compact and scientific form, of the difference branches of our substantive law, which are still uncodified, would be a work of utmost utility, not only to the judges and the legal profession, but also to the people and the Government.’

On the other, Sir Henry Maine, the then law member of the Indian Government, also relied on ‘the largeness of the sphere practically occupied in India by the English law of contract’¹⁸ as a reason for codification.

The decision to codify contract law was aided by the frequency of contract disputes in British India.¹⁹ Equally, it was felt that a uniform and satisfactory law could be framed on the topic.²⁰ Commentators have also suggested that the practical consequences of the growth of modern business in India in the latter half of the 19th century provided the impetus for creating a uniform contract code.²¹ It may have been for this reason that the

⁸ Stelios Tofaris, ‘A Historical Study of the Indian Contract Act 1872’ (PhD thesis, University of Cambridge 2011) 7.

⁹ See for example, Bengal Regulation VII of 1832, s 9 cited in Patra (n 5) 377–378.

¹⁰ Jain (n 7) 547.

¹¹ The Hindu Law rule that the amount of interest on a debt cannot exceed the principal amount (the rule of *damdupat*) is an example: see, Jain (n 7) 672.

¹² Alan Gledhill, *The Republic Of India: The Development of its Laws and Constitution* (George E Keeton ed, The British Commonwealth Series vol 6, 2nd edn, Stevens 1964) 291.

¹³ Tofaris (n 8) 5–88.

¹⁴ Sir Francis Workman Macnaghten, *Considerations on the Hindoo Law, as it is current in Bengal* (Mission Press 1824) 403 (emphasis in original).

¹⁵ Sir George Claus Rankin, *Background to Indian Law* (The University Press 1946) 90.

¹⁶ *ibid* 92.

¹⁷ Despatch to the Secretary of State for India dated 10th May 1877 cited in Jain (n 7) 603–604.

¹⁸ Statement of Objects and Reasons, Parliamentary Papers, House of Commons (1867–68) XLIX, 86.

¹⁹ Indian Law Commissioners, Second Report on the Substantive Law of India, Parliamentary Papers, House of Commons (1867–68) XLIX, 3.

²⁰ *ibid*.

²¹ Rankin (n 15) 92.

move towards codification of substantive contract law did not invite any significant hostility in India.²²

2. Legislative History of the Indian Contract Act 1872

The legislative history of the Indian Contract Act 1872 may be considered in three phases.²³ First, on 8th July 1866, the Third Indian Law Commission²⁴ submitted their second report which contained a draft of the Act.²⁵ The Commission, based in England, consisted of Lord Romilly, Sir William Erle, Sir Edward Ryan, Mr Robert Lower (Lord Sherbrooke), Mr Justice Willes, and Mr Macleod.²⁶ The draft code was largely based on English law.²⁷

In some particulars, the Commission proposed that the law in India should depart from the English position,²⁸ and some points are of particular note. So far as the general law of contract was concerned, they (i) considered the Statute of Frauds to be unsuitable for application in India; (ii) decided to retain the doctrine of consideration, but in place of the rule that promises given under seal were enforceable without consideration, proposed that promises which were written and registered should be enforceable despite the absence of consideration; (iii) rejected the supposed rule of the English common law that the bare agreement of a creditor to accept partial performance of an outstanding obligation in full discharge of the obligation was unenforceable because unsupported by consideration, preferring instead the view that the creditor could release the debtor and the debt, in whole or in part, without the need for consideration; (iv) proposed that the equitable rule that penalties were unenforceable should be abolished and the sum stipulated in the contract for payment on breach be recoverable whether penal or not; and (v) took the view that a person who purchased goods in good faith from a person in possession but who had not title would gain a good title. They made no mention of the doctrine of privity, though as that principle was at that time not fully formed in English common law, little can be read into that. The treatment of fraud and misrepresentation was somewhat surprising but of great interest. Deceit, defined as 'not only by intentionally inducing him to believe what is not true, but intentionally concealing the truth from him', rendered the contract voidable at the option of the party induced thereby. False representation, made knowingly or ignorantly, which induced another to enter into a contract, obliged the party making the representation to put the other in the same position as if the representation had been true, and in default of his doing so, the contract was voidable at the option of the party misled. It would appear that it was the discarding of these proposals in favour of what became Sections

²² Whitley Stokes, *Anglo-Indian Codes* (Clarendon Press 1887-88) xxi; Rankin (n 15) 94; Gledhill (n 12) 291.

²³ Sir Frederick Pollock and Dinshah Fardunji Mulla, *The Indian Contract Act: With a commentary, critical and explanatory* (1st edn, Sweet and Maxwell 1905) iv-v; Tofaris (n 8) 88.

²⁴ The Charter Act 1833, s 53 appointed the first Indian Law Commission. It was charged with the responsibility of looking into 'the nature and operation of all laws [in India], and suggest alterations'. Subsequently, a second law commission was appointed under the Charter Act 1853. Disappointed with the functioning of the first law commission, this time, the venue of the commission was changed from India to England. The third law commission came into being on 2nd December 1861.

²⁵ Indian Law Commissioners (n 19) 6-48.

²⁶ CP Ilbert, 'Indian Codification' (1889) 5 LQR 347, 349.

²⁷ Bijay Kisor Acharyya, *Codification in British India* (SK Banerji 1914) 66; RN Gooderson, 'English Contract Problems In Indian Code And Case Law' (1958) 16 Cambridge Law Journal 67, 68.

²⁸ Indian Law Commissioners (n 19) 3.

17 and 18 of the Contract Act that attracted the particular criticism of Pollock to which we refer below.

It may also be that, in a few instances, the Commission's draft drew inspiration from Civil law. For example, many commentators have suggested that in the definition of a contract,²⁹ and in its treatment of mistakes,³⁰ the draft mirrored Pothier.³¹ Certainly, William Macpherson, the Secretary to the Indian Law Commission, had praised Pothier's analysis of 'mistake' in his treatise on contract law.³² Overall, the Commission's draft was well-received. Sir Frederick Pollock noted that it had 'great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago'.³³

The second phase began in 1867, when the Commission's draft was sent to the Legislative Council in India.³⁴ It was introduced in the Legislative Council and then referred to a select committee.³⁵ At this stage, disagreements began to emerge between the Commission in England and the select committee in India. There were three main points of contention. The Commission had proposed that the general position should be that a bona fide purchaser without notice acquired good title to goods from any person in possession of them;³⁶ the select committee objected to this rule, contending that such a rule would attract cattle stealers to British India.³⁷ The Commission had proposed that the common law (or equitable) rule against penalties should not be extended to India, recommending that all such payments be simply treated, and enforced, as liquidated damages;³⁸ the committee favoured treating all liquidated damages as penalties instead.³⁹ In addition, Sir Henry Maine, the then law member of the Government, disagreed with the specific performance provisions in the Commission's draft. In particular, while it was laid down that a contract for the transfer of any interest in immovable property was specifically enforceable, the Explanation to the relevant clause of the draft code made clear that a contract 'to cultivate land in a particular manner, or to grow particular crops' did not create such an interest in immovable property as to be specifically enforceable. However, Maine believed that specific performance was the only effective remedy in these cases.⁴⁰

These differences proved hard to resolve. The Legislative Council had also failed to act upon some of the Commission's previous recommendations. Eventually, this led to the

²⁹ Clause 1 of the Draft Code, Indian Law Commissioners (n 19) 6.

³⁰ Clause 7 of the Draft Code: *ibid* 6.

³¹ David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 227; Warren Swain, *The Law of Contract 1670–1870* (CUP 2015) 264.

³² William Macpherson, *Outlines of the Law of Contracts, as administered in the courts of British India* (1860).

³³ Pollock and Mulla (n 23) v. See also, MC Setalvad, *The Common Law in India* (Stevens 1960) 70–71.

³⁴ Under the Charter Act 1833, the Legislative Council was the primary legislating body for British India. It had wide powers of legislation, including the power to repeal, amend or alter existing laws: JD Heydon, 'The Origins Of The Indian Evidence Act' (2010) 10 *Oxford University Commonwealth Law Journal* 15–16.

³⁵ Jain (n 7) 647.

³⁶ Clause 81 of the Commission's Draft Code: see, Indian Law Commissioners (n 19) 23.

³⁷ Ilbert (n 26) 351.

³⁸ Clause 50 of the Commission's Draft Code: see, Indian Law Commissioners (n 19) 16.

³⁹ Tofaris (n 8) 130.

⁴⁰ It has been suggested that Sir Henry Maine was specifically concerned about contractual performance by Indian *ryots* (peasants) and *zamindars* (landholders) who had entered into contracts with European planters to supply indigo: Tofaris (n 8) 115.

resignation of the Commissioners in 1870.⁴¹ In the meantime, in 1869, Sir James Fitzjames Stephen had taken over from Maine as the law member of the Government in India. This led to the third and final phase of the 1872 Act's legislative history. The Law Commissioners' resignation gave Stephen freedom to preparing the final draft of the Bill as he saw fit.⁴² He took the view that the first fifty clauses required complete overhaul.⁴³ He redrew the whole of the first part of the Bill.⁴⁴ The later provisions relating to Sale of Goods, Agency and Partnership were, on the other hand, left largely unchanged.⁴⁵ In this final form, the Contract Act 1872 became law in India.⁴⁶

Stephen's revisions during the final stage of the 1872 Act's history have been criticised by some commentators. Pollock, in particular, criticised the final version of the Act for being internally inconsistent describing it as 'the work of different hands... from quite different points of view.'⁴⁷ He thought that Stephen had made a particular mistake by including provisions (in particular, on fraud and misrepresentation) from Dudley Field's Civil Code of New York which he castigated as the 'worst piece of codification ever produced'; and he went on: 'Whenever this Act is revised everything taken from Mr Dudley Field's code should be struck out, and the sections carefully recast after independent examination of the best authorities'. He was of the view that it required 'patient, penetrating revision'.⁴⁸

One hesitates to question the clear opinions of such powerful minds, but the authors of the present book do not agree that the 1872 Act is a poor product. On the contrary, it seems to us that in most respects it is a highly impressive piece of work, which has proved remarkably robust. In so far as revisions are needed, it is our view that, at least at this stage, they are relatively minor.

Two particularly interesting features of the 1872 Act are worth pointing out. The first is the extensive use of Illustrations within the Act. In India, it was first used by Macaulay in the Indian Penal Code, 1860. The first Indian Law Commission (which drafted the Indian Penal Code) spoke about the use of illustrations in this passage:

'These illustrations will, we trust, greatly facilitate the understanding of law, and will at the same time often serve as a defence of law. In our definitions, we have often found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using hard and awkward expressions which would convey our whole meaning and no more than our whole meaning. Such definitions standing by themselves would repel and perplex every reader... we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which, though at first sight they appear to fall under it, do not really fall under it, the definitions and the reasons which led the adoption of it will be readily understood.'

Secondly, although the Contract Act as eventually made was essentially regarded as a codification of English law, there are some significant departures from what we now understand to be English common law. The most obvious are the approach to aspects of the law on

⁴¹ Letter from the Indian Law Commissioners to the Duke of Argyll dated 2nd July 1870, cited in Ilbert (n 26) 352.

⁴² Stephen is quoted as having written in correspondence that he was left feeling 'practically and substantially... like a sort of king in my own department for nobody interferes with me and I can bring in... pretty well whatever I choose': see Tofaris (n 8) 128.

⁴³ In effect this means the whole of the law made as Sections 1 to 75 of the Contract Act, with the exception of what became Sections 68 to 72.

⁴⁴ Swain, *The Law of Contract 1670–1870* (n 31) 269.

⁴⁵ Rankin (n 15) 100; Tofaris (n 8) 129, 130. ⁴⁶ Ilbert (n 26) 352.

⁴⁷ Pollock and Mulla (n 23) v. ⁴⁸ Stokes (n 22) 554.

consideration, privity of contract, and penalty clauses. For example, an agreement will be binding even though consideration is past; and part payment of a debt is good consideration for a promise to forgo the balance.⁴⁹ It is also clear that consideration can move from someone other than the promisee and there is no overtly stated privity rule in the Act. And a penalty clause will not be struck down but will be given effect to as an agreement to pay reasonable compensation. This may be thought to reflect the fact that these common law rules were controversial from the outset and, even if thought to be established by 1872, were an obvious target for those able to codify a preferable approach.

(B) The Myanmar Contract Act 1872

1. Contract Law in Burma Before the 1872 Act

Before the British conquest, Burma was governed by absolute monarchs of the Konbaung Dynasty.⁵⁰ Then, Burma's legal system consisted of *lawka-wut* (civil law) and *raza-wut* (criminal law).⁵¹ *Lawka-wut*, within the scope of which contractual disputes would fall, were resolved by reference to *dhammathats*. *Dhammathats* are roughly equivalent to legal treatises that embody rules of custom and usage.⁵² *Dhammathats* consist of 'manual texts' i.e. a collection of bodies of knowledge, and 'narrative texts' i.e. accounts of entire legal stories.⁵³ The pre-colonial legal system in Burma also benefitted from a specialised legal profession that developed over time.⁵⁴ Many commentators consider the Burmese legal system of this era to have been among the most well-developed in South Asia.⁵⁵ Consequently, they are critical of its eventual displacement by Anglo-Indian codes.⁵⁶

2. British Conquest: The Extension of Anglo-Indian Contract Law to Burma

In the realm of contract law, Burma's indigenous legal system was eventually replaced by the Indian Contract Act. The Indian Act was gradually extended to govern all of Burma's territory. That process proceeded in three parts, coinciding largely with the three Anglo-Burmese wars of the 19th century.

⁴⁹ The Law Commissioners made clear that on this latter point they were choosing to depart from English law. See above Chapter 6.10.

⁵⁰ Kyaw Hla Win & Md Ershadul Karim, *The Legal System of the Republic of the Union of Myanmar in a Nutsbell*: <http://www.nyulawglobal.org/globalex/Myanmar.html>.

⁵¹ Thant Myint-U, *The Making of Modern Burma* (CUP 2001) 87.

⁵² Myint Zan, 'Of Consummation, Matrimonial Promises, Fault, And Parallel Wives: The Role Of Original Texts, Interpretation, Ideology And Policy In Pre And Post 1962 Burmese Case Law' (2000-2001) 14 *Columbia Journal of Asian Law* 155, 157.

⁵³ Melissa Crouch, 'The Layers of Legal Development in Myanmar' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart 2014) 34.

⁵⁴ *ibid* 35.

⁵⁵ Andrew Huxley, 'Pre-colonial Burmese Law: Conical hat and shoulder bag': <http://iiias.asia/iiasn/25/theme/25T7.html>; Crouch (n 53) 35.

⁵⁶ U Hla Aung, 'The Effect of Anglo-Indian Legislation on Burmese Customary Law' in David Buxbaum (ed), *Family Law and Customary Law in Asia: A Contemporary Legal Perspective* (Martinus Nijhoff 1968) 73; Crouch (n 53) 35.

(a) The Anglo-Burmese Wars

In 1824, at the end of the first Anglo-Burmese war, the British annexed the coastal provinces of Arakan and Tenasserim.⁵⁷ At this stage, the British administrators attempted to work with the existing legal system in Burma. For instance, Mr Maingy, the first British Commissioner to Burma is reported to have declared to the Burmese people that 'proper measures shall be immediately adopted for administering justice to you *according to your own established laws* so far as they do not militate against the principles of humanity and natural equity'.⁵⁸

Very soon however, this task proved too onerous. Mr Maingy was entirely unaware of the laws and customs of Burma. He was also unacquainted with the language of the *dhammathats* – Pali and Burmese. This led him to conclude, mistakenly, that Burma had 'no fixed Code of Laws' and that all 'decisions are arbitrary'.⁵⁹ Although several studies of Burma's legal system were carried out in this period, and the *dhammathats* were compiled and translated,⁶⁰ the colonial attempt to administer the indigenous legal system in Myanmar had failed unequivocally.

The second Anglo-Burmese war, of 1852, resulted in British annexation of a sizeable portion of southern Burma consisting of Pegu, Rangoon, Bassein and Prome.⁶¹ Subsequently, in 1862, the British territories of Myanmar were consolidated into a single unit called 'British Burma'.⁶² They were brought under the overall control of a Chief Commissioner.⁶³ The following decades witnessed two significant changes.

First, in 1866, the Chief Commissioner was empowered to enforce the laws of British India in Burma.⁶⁴ This gave rise to the possibility of extension of Anglo-Indian statutes to Burma. Even before their formal extension however, it appears that they were being used as 'unofficial guides' in Myanmar.⁶⁵ Secondly, in 1872, the Chief Commissioner was divested of his judicial powers. Those functions were conferred on a Judicial Commissioner.⁶⁶ Legal administration by the Judicial Commissioner and the practice of law by professional lawyers had a negative impact on the indigenous laws of Burma. For example, during this period, the *dhammathats* came to be applied as rigid rules.⁶⁷ In reality, they were meant to embody broad principles of conduct. In some cases, the legal administration even substituted 'western law' in the place of law and custom in Burma.⁶⁸ By the end of the third Anglo-Burmese war of 1885, the British had annexed the whole of Burma.⁶⁹

(b) The extension of Indian laws to Burma, and Burmese separation from India

The incorporation of Burma as a province of British India proceeded in stages, but it was not until 1 May 1897 that the province acquired its own Lieutenant-Governor and Legislative Council with its own law-making authority. The extension to Burma of colonial Indian

⁵⁷ U Hla Aung (n 56) 67. ⁵⁸ *ibid* 68 (emphasis added).

⁵⁹ JS Furnivall, *Colonial Policy and Practice* (CUP 1948) 31.

⁶⁰ Maung Maung, *Law and Custom in Burma and the Burmese Family* (Martinus Nijhoff 1963) 27.

⁶¹ U Hla Aung (n 56) 67. ⁶² Also known as 'Lower Burma': see, Maung Maung (n 60) 20.

⁶³ FSV Donnison, *Public Administration in Burma: A Study of Development During the British Connexion* (Royal Institute of International Affairs 1953) 27.

⁶⁴ Crouch (n 53) 36. However, the Chief Commissioner was still not authorised to promulgate new laws for Burma: see Donnison (n 63) 29.

⁶⁵ Maung Maung (n 60) 31. ⁶⁶ Furnivall (n 59) 133. ⁶⁷ *ibid*.

⁶⁸ *ibid* 134. ⁶⁹ U Hla Aung (n 56) 67.

laws,⁷⁰ including, of course, the Indian Contract Act 1872,⁷¹ proceeded in a similar gradual way. Commentators rightly point out that the Anglo-Indian codes were ‘largely unaltered’ in their extension to Burma.⁷² The only differences between the Indian Contract Act 1872 and the Myanmar Contract Act 1872 are minor factual amendments to some of the Illustrations (for example, changing Bombay to Rangoon). Presumably those amendments to the Illustrations were made during the process of extension of existing Indian laws to the new province.

The following years witnessed the growth of colonial judicial administration in Burma,⁷³ and by the early 1920s, the process of creating a new Burmese legal system through the substantial importation of Indian legislation was essentially complete.⁷⁴ In 1937, Burma became a separately administered British colony, but the status of the 1872 Contract Act was preserved.⁷⁵ Similarly, upon Burma’s independence from British rule in 1948, the Constitution of Burma provided for the continuance in force of all its existing laws in so far as they were constitutionally compliant.⁷⁶ Thus, the Myanmar Contract Act continued to remain in force.

(c) *Law reform*

Although law reform bodies in India have proposed some amendment to the Indian Contract Act, these have not been taken up; and in Myanmar there appears to have been no suggestion that the Contract Act should be amended in any way. In this context, though, it is necessary to say something about the principles of ‘justice, equity and good conscience’ to which a court in Myanmar is directed by the Burma Laws Act 1898. We have pointed out in several places that these principles were sometimes used to decide contract cases in India prior to the 1872 Act; and that this provided a bridge to the application of English law.⁷⁷ These principles came across to Burma and, very significantly, were included in the Burma Laws Act 1898, Section 13(3):

13. (1) Where in any suit or other proceeding in the Union of Burma it is necessary for the Court to decide any question regarding succession, inheritance marriage or caste, or any religious usage or institution:

- (a) the Buddhist law in cases where the parties are Buddhists,
- (b) the Muhammadan law in cases where the parties are Muhammadan and
- (c) the Hindu law in cases where the parties are Hindus,

⁷⁰ *ibid* 71–72.

⁷¹ Notably, the Indian Contract Act 1872, s 1 as originally enacted provided that it applied to ‘the whole of British India’: see Pollock and Mulla (n 23) 1. Since 1897, this included Burma.

⁷² Crouch (n 53) 36.

⁷³ Nang Yin Kham, ‘An Introduction to the Law and Judicial System of Myanmar’, CALS Myanmar Working Paper, No 1, March 2014: http://law.nus.edu.sg/pdfs/cals/working_papers/Myanmar/MWPS001.pdf.

⁷⁴ *ibid* 4.

⁷⁵ Government of Burma Act 1935 (an Act of the United Kingdom Parliament, which is the counterpart of the Government of India Act 1935). According to s 148 of that Act: ‘all the law in force in Burma immediately before the commencement of this Act shall continue in force in Burma until altered or repealed or amended by the Legislature or other competent authority.’

⁷⁶ Constitution of Burma 1948, art 226(1). An equivalent provision is found in the Constitution of the Union of Myanmar 2008, art 446.

⁷⁷ Above text to n 8.

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

...

(3) In cases not provided for by sub-section (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.

Although Section 13(3) appears at first sight to be dealing with matters of succession *et cetera* that fall outside subsection (1), it is clear from our conversations with Myanmar lawyers and judges that that subsection is interpreted by them as a general provision applicable in all cases where the written laws of Myanmar are silent. This view is supported and confirmed by an important judgment of the Chief Court⁷⁸ in which the Court had been pressed with the argument that, where the written laws of Myanmar did not express provision for the relief applied for, there was nothing the court could do. The Court said: 'where there is neither provision nor prohibition [the Court] has to be guided by ordinary principles of common sense, justice, equity and good conscience'.⁷⁹ It follows that, as we have pointed out throughout this book, where the Myanmar Contract Act 1872 runs out, the courts in Myanmar can, and do, and should apply the principles of 'justice, equity and good conscience'.⁸⁰ We have therefore taken the view that, where the 1872 Act does not apply, and because Myanmar belongs to the common law world, these principles can provide a bridge for Myanmar contract law to modern general contract principles applied in other common law systems.

⁷⁸ *Steel Bros & Co Ltd v YA Ganny Sons* (1965) BLR 449 (CC). ⁷⁹ *ibid* at 463.

⁸⁰ See generally on the origins of this phrase the following: MB Hooker, 'English Law and the Invention of Chinese Personal Law in Singapore and Malaysia' in MB Hooker (eds) *Law and the Chinese in Southeast Asia* 95 ('Personal law is a unique phenomenon and is found only in ex-British possessions which had English (common) law as the general law for the population. It may be defined as rules... (d) but subject to the *English law standards of justice, equity and good conscience*'); Tun Tun Aung, 'A Report on the Development of Judiciary in the Union of Myanmar':

http://dspace.lib.niigata-u.ac.jp/dspace/bitstream/10191/6352/1/01_0006.pdf ('For Myanmar, the Indo-British legal system has as its basis the British conception of justice, equity and good conscience has been still continued'); Nyo Nyo Thinn, 'The Legal System in Myanmar and Foreign Legal Assistance' Law and Development Forum :

http://koara.lib.keio.ac.jp/xoonips/modules/xoonips/image.php/AA1203413X-20060515-0387.pdf?file_id=14558; Duncan M Derrett, 'Justice, Equity and Good Conscience' in JND Anderson (ed), *Changing Law in Developing Countries* (George Allen & Unwin 1963) 114.



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THE CONTRACT ACT¹

[INDIA ACT IX, 1872] (1st September, 1872.)

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows:—

PRELIMINARY

1. **Saving.** Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed,² nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.
2. **Interpretation Clause.** In this Act the following words and expressions are used in the in the following senses, unless a contrary intention appears from the context:—
 - (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
 - (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted,³ becomes a promise:
 - (c) The person making the proposal is called the “promisor,” and the person accepting the proposal is called the “promisee”:

¹ The Chapters and sections of the Transfer of Property Act which relate to contracts are, in places in which that Act is in force, to be taken as part of this Act; see section 4 of the Transfer of Property Act.

² i.e., repealed by the Indian Contract Act (India Act IX, 1872).

³ As to when communication of acceptance becomes complete, see section 4, illustration (b).

- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement:
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:
- (g) An agreement not enforceable by law is said to be void:
- (h) An agreement enforceable by law is a contract:
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I

Of the Communication, Acceptance and Revocation of Proposals

3. Communication, acceptance and revocation of proposals. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

4. Communication when complete. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete: as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete: as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

- (a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.
- (b) B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete,— as against A, when the letter is posted; as against B, when the letter is received by A.
- (c) A revokes his proposal by telegram. The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

5. Revocation of proposals and acceptances. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

6. Revocation how made. A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

7. Acceptance must be absolute. In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

8. Acceptance by performing conditions, or receiving consideration. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. Promises, express and implied. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II

Of Contracts, Voidable Contracts and Void Agreements

10. What agreements are contracts. All agreements are contracts⁴ if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in the Union of Burma, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

⁴ See section 2, cl. (h).

11. Who are competent to contract. Every person is competent to contract who is of the age of majority according to the law to which he is subject,⁵ and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes of contracting. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

- (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
- (b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

13. “Consent” defined. Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. “Free consent” defined. Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. “Coercion” defined. “Coercion” is the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes B to enter in to an agreement by an act amounting to criminal intimidation under the Penal Code.

A afterwards sues B for breach of contract at Rangoon.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Penal Code was not in force at the time when or place where the act was done.

16. “Undue Influence” defined. (1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

⁵ See the Majority Act.

- (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
 - (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- (3) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act.

Illustrations.

- (a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.
- (b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.
- (c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.
- (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

17. **“Fraud” defined.** “Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,⁶ with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,⁷ or unless his silence is, in itself, equivalent to speech.

Illustrations.

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.
- (b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound
- (c) B says to A—“If you do not deny it, I shall assume that the horse is sound.” A says nothing. Here, A's silence is equivalent to speech.

⁶ Compare section 238.

⁷ See section 143.

- (d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

18. "Misrepresentation" defined. "Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

19. Voidability of agreements without free consent. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

- (a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.
- (b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.
- (c) A, fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.
- (d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.
- (e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

19A. Power to set aside contract induced by undue influence. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

- (a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.
- (b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent, per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

20. Agreement void where both parties are under mistake as to matter of fact. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

- (a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Rangoon. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.
- (b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.
- (c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

21. Effect of Mistakes as to Law. A contract is not voidable because it was caused by a mistake as to any law in force in the Union of Burma; but a mistake as to a law not in force in the Union of Burma has the same effect as a mistake of fact.

Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the law of limitation: the contract is not voidable.

22. Contract caused by mistake of one party as to matter of fact. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

23. What considerations and objects are lawful, and what not. The consideration or object of an agreement is lawful, unless—

- it is forbidden by law;⁸ or
- is of such a nature that, if permitted, it would defeat the provisions of any law; or
- is fraudulent; or
- involves or implies injury to the person or property of another; or
- the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations.

- (a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

⁸ See sections 26, 27, 28 and 30.

- (b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.
- (c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.
- (d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.
- (e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
- (f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.
- (g) A being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud, by concealment by A, on his principal.
- (h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.
- (i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.
- (j) A, who is B's pleader, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.
- (k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code.

Void Agreements.

24. Agreements void, if considerations and objects unlawful in part. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration.

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

25. Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law. An agreement made without consideration is void, unless—

- (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless
- (3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.— Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.— An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- (b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- (c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- (d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.
- (e) A owes B Rs. 1000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- (f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
- (g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

26. Agreement in restraint of marriage void. Every agreement in restraint of the marriage of any person, other than a minor, is void.

27. Agreement in restraint of trade void. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.

Saving of agreement not to carry on business of which good-will is sold. *Exception 1.*— One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exceptions 2 & 3 ****

28. Agreements in restraint of legal proceedings void. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise. *Exception 1.*— This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subject shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts.⁹ *When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery*

⁹ This clause was repealed by the Specific Relief Act, 1877 (India Act I, 1877), throughout India or Pakistan including the Union of Burma. The clause is, however, printed here in italics, because it is operative in areas, if any, where the Contract Act is in force and to which the Specific Relief Act has not been applied.

of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen. *Exception 2*— Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

29. Agreements void for uncertainty. Agreements the meaning of which is not certain, or capable of being made certain, are void.

Illustrations.

- (a) A agrees to sell to B “a hundred tons of oil.” There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
- (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.
- (c) A, who is a dealer in cocoanut-oil only, agrees to sell to B “one hundred tons of oil.” The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.
- (d) A agrees to sell B “all the grain in my granary at Prome.” There is no uncertainty here to make the agreement void.
- (e) A agrees to sell to B “one thousand maunds of rice at a price to be fixed by C.” As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- (f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand.” There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager void. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horseracing. This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse race.¹⁰

Section 294A of the Penal Code not affected. Nothing in this section shall be deemed to legalize any transaction connected with horse-racing to which the provisions of section 294A of the Penal Code apply.

CHAPTER III

Of Contingent Contracts

31. “Contingent contract” defined. A “contingent contract” is a contract to do or not to do something if some event, collateral to such contract, does or does not happen.

¹⁰ Cf. the Gaming Act, 1845 (8 and 9 Viet. c. 109), section 108.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

32. Enforcement of contracts contingent on an event happening. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations.

- (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
- (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
- (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

33. Enforcement of contracts contingent on an event not happening. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. When contracts become void which are contingent on happening of specified event within fixed time. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time. Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations.

- (a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
- (b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreement contingent on impossible events void. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations.

- (a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
- (b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV

Of the Performance of Contracts.

Contracts which must be performed.

37. Obligation of parties to contracts. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

- (a) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.
- (b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

38. Effect of refusal to accept offer of performance. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

- (1) it must be unconditional;
- (2) it must be made at a proper time and place, and under such circumstances, that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to B at his warehouse, on the first of March, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. Effect of refusal of party to perform promise wholly. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations.

- (a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.
- (b) A, a singer, enters in to a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

By whom Contracts must be performed.

40. Person by whom promise is to be performed. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

- (a) A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
- (b) A promises to paint a picture for B. A must perform this promise personally.

41. Effect of accepting performance from third person. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. Devolution of joint liabilities. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them his representative jointly with the survivor or survivors, and after the death of the last survivor the representatives of all jointly, must fulfil the promise.

43. Any one of joint promisors may be compelled to perform. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

- (a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.
- (b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.
- (c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.
- (d) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

44. Effect of release of one joint promisor. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.¹¹

45. Devolution of joint rights. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor with the representatives of all jointly.¹²

Illustration.

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Time and Place for Performance.

46. Time for performance of promise where no application is to be made and no time is specified. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question “what is a reasonable time” is, in each particular case, a question of fact.

47. Time and place for performance of promise where time is specified and no application to be made. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual, hours of business on such day and at the place at which the promise ought to be performed.

¹¹ See section 138.

¹² For an exception to section 45 in the case of Government securities, see section 4 of the Government Securities Act.

Illustration.

A promises to deliver goods at B's warehouse on the first of January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

48. Application for performance on certain day to be at proper time and place. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation— The question “what is a proper time and place” is, in each particular case, a question of fact.

49. Place for performance of promise where no application to be made and no place fixed for performance. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. Performance in manner or at time prescribed or sanctioned by promisee. Performance of any promise may be made in any manner, or at any time, which the promisee prescribes or sanctions.

Illustrations.

- (a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.
- (b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.
- (c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.
- (d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Performance of Reciprocal Promises

51. Promisor not bound to perform unless reciprocal promisee ready and willing to perform. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations.

- (a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods unless B is ready and willing to pay for the goods on delivery. B need not pay for the goods unless A is ready and willing to deliver them on payment.

- (b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery. A need not deliver unless B is ready and willing to pay the first instalment on delivery. B need not pay the first instalment unless A is ready and willing to deliver the goods on payment of the first instalment.

52. Order of performance of reciprocal promises. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

- (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
- (b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

53. Liability of party preventing event on which the contract is to take effect. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation¹³ from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations.

- (a) A hires B's ship to take in and convey, from Rangoon to Calcutta, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.
- (b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- (c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

¹³ See section 73.

- (d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. Effect of failure to perform at fixed time in contract in which time is essential. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance and or performance at other time than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.¹⁴

56. Agreement to do impossible act. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹⁵

Compensation for loss through non-performance of act known to be impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

¹⁴ Compare sections 62 and 63.

¹⁵ See section 65 of this Act and section 13 of the Specific Relief Act.

57. Reciprocal promise to do things legal, and also other things illegal. Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it. The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract. The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

58. Alternative promise, one branch being illegal. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments.

59. Application of a payment where debt to be discharged is indicated. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations.

- (a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first of June. He owes B no other debt of that amount. On the first of June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.
- (b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

60. Application of payment where debt to be discharged is not indicated. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be performed.

62. Effect of novation, rescission and alteration of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

- (a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end and a new debt from C to B has been contracted.
- (b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.
- (c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

63. Promisee may dispense with or remit performance of promise. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,¹⁶ or may accept instead of it any satisfaction which he thinks fit.

Illustrations.

- (a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.
- (b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.
- (c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim.
- (d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B in satisfaction thereof accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.
- (e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

64. Consequences of rescission of voidable contract. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.¹⁷

65. Obligation of person who has received advantage under void agreement or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations.

- (a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.
- (b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.
- (c) A, a singer contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's

¹⁶ But *see* section 135.

¹⁷ *See* section 75.

performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

- (d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

66. Mode of communicating or revoking rescission of voidable contract. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A contracts with B to repair B's house. B neglects or refuses to point out to A the places in which his house requires repair. A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V

Of Certain Relations Resembling those Created by Contract

68. Claim for necessaries supplied to person incapable of contracting, or on his account.

If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations.

- (a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.
- (b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

69. Reimbursement of person paying money due by another in payment of which he is interested. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration.

B holds land on a lease granted by A. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

70. Obligation of person enjoying benefit of non-gratuitous act. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so

gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations.

- (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
- (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

71. Responsibility of finder of goods. A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.¹⁸

72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion. A person to whom money has been paid, or anything delivered, by mistake or under coercion¹⁹ must repay or return it.

Illustrations.

- (a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over to C. C is bound to repay the amount to B.
- (b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI

Of the Consequences of Breach of Contract

73. Compensation for loss or damage caused by breach of contract. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

- (a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if

¹⁸ See sections 151 and 152.

¹⁹ For definition of "coercion" see section 15.

- any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.
- (b) A hires B's ship to go to Bombay, and there take on board, on the first of January a cargo which A is to provide and to bring it to Rangoon, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.
- (c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
- (d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.
- (e) A, the owner of a boat, contracts with B to take a cargo of paddy to Rangoon, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Rangoon is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of paddy falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Rangoon at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.
- (f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.
- (g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.
- (h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.
- (i) A delivers to B, a common carrier, a machine, to be conveyed without delay to A's mill, informing B that A's mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A in consequence loses a profitable contract with the Government. A is entitled to receive from B by way of compensation the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.
- (j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.
- (k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence

of this B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

- (l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be rebuilt by B, who in consequence loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.
- (m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.
- (n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.
- (o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.
- (p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.
- (q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.
- (r) A, a ship-owner, contracts with B to convey him from Rangoon to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and B, after being in consequence detained in Rangoon for some time and thereby put to some expense, proceeds to Sydney in another vessel, and in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Rangoon, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

74. Compensation for breach of contract where penalty stipulated for. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to

have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

- (a) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.
- (b) A contracts with B that if A practises as a surgeon within Rangoon he will pay B Rs. 5,000. A practises as a surgeon in Rangoon. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.
- (c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.
- (d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. At the end of six months, with a stipulation that in case of default interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
- (e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.
- (f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.
- (g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

75. Party rightfully rescinding contract entitled to compensation. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non fulfilment of the contract.

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.



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