

UNDERSTANDING THE LAW OF CONTRACT IN MYANMAR*

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1. Introduction

What is the law of contract in Myanmar and how far does it differ from modern English contract law? These are surprisingly difficult and intriguing questions. Certainly much of the general law of contract in Myanmar is very similar to the general law of contract in England and Wales. This is because the Myanmar law of contract largely comprises the Myanmar Contract Act 1872¹ (which is identical to the Indian Contract Act 1872 subject to some factual changes in the illustrations) and that Act was not only drafted by English lawyers² but also, and more importantly, appears to have been essentially regarded as a statutory codification of the English common law of contract.

Nevertheless, as an English contract lawyer who, for the purposes of a teaching visit to Yangon University,³ was looking for the first time in detail at the 1872 Act I was immediately struck by what appear to be some significant differences between that Act and English law. In other words, it would appear that those drafting the 1872 Act took the opportunity to amend the common law in some respects or, perhaps, took as the best interpretation of the common law a view that has subsequently not found favour in English law.

Such differences can be detected simply by reading the 1872 Act (on the assumption that one has a basic knowledge of the English law of contract). More difficult to determine are the differences, if any, where the 1872 Act runs out and there is no other Myanmar statute (such as the Specific Relief Act 1877 or the Sale of Goods Act 1930) in play. Here the problem is that one does not know where to turn for the law of contract in Myanmar beyond the statutes. Plainly in England and Wales and other common law systems, where there are gaps in the coverage of statute law they are filled by the common law, ie by judge-made law, which one finds by reading the decisions or rulings of the courts. And the best guide to that mass of case decisions is to be found in the books on contract law, such as *Chitty on Contracts*, *Anson on Contract*, *Treitel on Contract*, and *Cheshire, Fifoot and Furmston on Contract* etc. There are now scores of such books on the English law of contract, mainly aimed at the student market.

Yet, as far as I am aware, and with the exception of a helpful but basic outline of the 1872 Act produced by the Yangon University of Distance Education (and first prepared by Professor Daw Than Nwe), there are no books on the Myanmar law of contract, whether as a commentary on the 1872

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¹ This Act is contained in Part XI of The Burma Code.

² A commission headed by Sir John Romilly made the recommendations that led to the Act and the final draftsman was Fitzjames Stephen.

³ This was undertaken in February 2015 under the auspices of the Oxford – Burma/Myanmar Law Programme. I also gave lectures on Contract at Dagon and East Yangon universities. I would like to thank Andrew McLeod, the then Director of the above Programme, for his great help in organising that trip.

Act as it applies in Myanmar or as a guide to the common law of contract that falls outside that, and any other, statute.⁴ In the modern world, this is very unusual. Indeed, I am not aware of any other jurisdiction where there is such uncertainty as to what the law of contract is and, allied to that, such a dearth of books on the domestic law of contract.

No doubt, there have been some decisions of the appellate courts in Myanmar which have made binding rulings on what the law of contract is. After all, Myanmar has a common law heritage and the rules of precedent appear to apply. Over the last fifty years or so, however, the law reports have been available, if at all, only in Burmese so that there is a linguistic bar to someone like me working out what they may contain.

In conversations with lawyers in Myanmar it was also brought to my attention that, when there is an apparent gap in the law, the judges, in accordance with the Burma Laws Act 1898 s 13(3), may apply underpinning principles of 'justice, equity and good conscience' to determine what the law is and should be.⁵ However, it is unclear, at least to a non-Burmese speaker, what specific rules those underpinning principles produce. It was suggested to me that where the statutes run out, the English law of contract or, sometimes the Indian law of contract (not least because the Indian Contract Act 1872 is identical in substance to the Myanmar Contract Act 1872), is applied; and that, therefore, the underpinning principles of 'justice, equity and good conscience' provide a bridge to the English (or possibly Indian) law of contract.

It may therefore be a fair inference that the Myanmar law of contract comprises the 1872 Act, other Myanmar statutes on contract law, rulings of the Myanmar appellate courts on contract, and, where none of the above apply, the English (or possibly the Indian) law of contract.

Of course, all this uncertainty as to what the law of contract is in Myanmar might be side-stepped by parties expressly choosing a foreign law (for example, English law or Indian law or the law of Singapore) to govern their contract. So a contract for the sale of goods between a Myanmar manufacturer and an English company might well include an English choice of law clause in which case the relevant law to apply, even if the contractual dispute is to be heard in the Myanmar courts, is English law. It would seem a pity and indeed something of a backward step for the law of contract in Myanmar to be lost in this way. Surely a better way forward is to discover and publicise what the law of contract in Myanmar precisely is and for that law to be applied, with confidence, by the Myanmar courts. That would respect the independence and cultural distinctiveness of the country.

⁴ Although I have not located a copy, I have been told that there is a book in Burmese on The Law of Contract by U Kyi Wynn (although, as I understand it, this is essentially merely a collection of statutory provisions about contract).

⁵ The Burma Laws Act 1898 s 13(3) reads: 'In cases not provided for by subsection (1), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.' Section 13(1) deals with the court having to decide 'any question concerning succession, inheritance, marriage or caste, or any religious usage or institution' and goes on to provide that Buddhist law, Muhammadan law and Hindu law shall be applied depending on whether the parties are, respectively, Buddhists, Muhammadans, or Hindus. One might at first sight assume that section 13(3) is also dealing with questions of succession and the like, and is a residual subsection within that area, but it is tolerably clear that s 13(3) is meant to cover all other areas (ie other than succession etc) where s 13(1) does not apply and hence applies to, for example, contract and tort. For consideration of this formula in the context of Indian law, see Duncan Derrett, 'Justice, Equity and Good Conscience in India' in *Essays in Classical and Modern Hindu Law* (1978) pp 8-27.

At the very least, one should not give up before one has made a real effort to understand what the Myanmar law of contract is.

It is in that spirit that this article seeks to examine some of the apparent differences, or uncertain gaps, between the Myanmar law of contract and the modern English law of contract. Some of these reflect important developments in English law since the 1872 Act was drafted; some are areas of contract law, where there is simply nothing said about the matter in the 1872 Act; others are differences that one can see simply by looking at the 1872 Act.

Where there is nothing in the 1872 Act, I make no apologies for setting out the English law in some detail. After all, if the principles of 'justice, equity and good conscience' do provide a bridge to English law, the English law may well also constitute the contract law of Myanmar. Moreover, my own expertise lies in English contract law and not, for example, Indian contract law.

I confine my attention to what is sometimes labelled the general law of contract as opposed to the special law, largely laid down in statutes, that applies to specific types of contract, such as contracts of sale, insurance contracts, contracts for the carriage of goods, contracts of employment, construction contracts, and arbitration agreements. It is not clear to me how far in Myanmar there are statutes, beyond those referred to in the amended 1872 Act (the Sale of Goods Act 1930 and the Partnership Act were originally in the Act but were later taken out and form discrete statutes), dealing with specific types of contract and which therefore go beyond the law contained in the Myanmar Contract Act 1872 and the Specific Relief Act 1877. The Sale of Goods Act 1930 is closely modelled on the English Sale of Goods Act 1893 (now superseded by Sale of Goods Act 1979) which was itself largely a codification of the relevant common law. I suspect that there are few such specific statutes so that the 1872 Act may have an even wider impact than does the common law of contract in England.

I am also not focussing on the many areas where there is plainly very little if any difference between modern English contract law and Myanmar law. So, for example, in the 1872 Act there are detailed rules on offer and acceptance (ss 2-9), on fraud and misrepresentation (ss 17-19), on initial impossibility/common mistake (s 20, s 56 (first and third clauses), s 65), on frustration (s 56 (second clause), s 56), and on damages for breach of contract (ss 73-75), where the provisions are very similar to the modern English law. The same can also be said of the availability of specific performance and injunctions as laid down in the Myanmar Specific Relief Act 1877, ss 12-30 and ss 52-57 respectively.

2. The law on consideration

It is a feature of common law systems of contract, in contrast to civilian systems, that (leaving aside a formal written document which in England is referred to as a deed) an agreement or promise is only binding as a contract if it is supported by consideration. This means that something must be given in exchange for the promise. So take the following three examples:

Example 1

A promises B £1000. B cannot enforce that promise because B has provided no consideration (nothing in exchange) for it.

Example 2

A promises B £10,000. B relies on that promise to buy a car. B cannot enforce that promise because B has provided no consideration (nothing in exchange) for it.

Example 3

A promises B £20,000 in return for B's promise to transfer his car to A. B makes that promise. B's promise is consideration for A's promise and B can therefore enforce A's promise.

Myanmar law also insists on the need for consideration (see s 2(d)-(h) and s 25 of the Myanmar Contract Act 1872) and would therefore reach the same answers as English law on those three examples. See especially s 25 which reads 'An agreement made without consideration is void...'

However, English law not only insists on consideration but requires it in situations where one might have thought it was unnecessary. In other words, although this has been criticised by eg the English Law Revision Committee in 1937, the English approach to the doctrine of consideration is a rigid one that allows few exceptions. So it is that first, past consideration is not good consideration; and secondly, part payment of a debt owed is not good consideration for a promise to forgo the rest of the debt. In both respects, Myanmar law differs from that in England.

(a) Past consideration

So in *Re McArdle* [1951] Ch 669, A promised Mrs McArdle £488 for work that Mrs McArdle had already done to A's house. Mrs McArdle could not enforce that promise because the consideration for it was past. Jenkins LJ said, at 678, '[T]he true position was that, as the work had all been done and nothing remained to be done by Mrs Marjorie McArdle at all, the consideration was a wholly past consideration, and, therefore, the ...agreement for the repayment to her of the £488 ... was nudum pactum, a promise with no consideration to support it.'

Other leading cases applying the same rule include *Eastwood v Kenyon* (1840) 11 Ad 7 E 438 and *Roscorla v Thomas* (1842) 3 QB 234.

In contrast in Myanmar, s 25 of the 1872 Act lays down that 'An agreement made without consideration is void 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...'

Two illustrations (c and d) are given in the Act applying this.

'A finds B's purse and gives it to him. B promises to give A Rs.50. This is a contract.'

'A supports B's infant son. B promises to pay A's expenses in so doing [ie for having done so]. This is a contract.'

One might say that the English law is the more logical in that, if a gratuitous promise in general is not a contract, why should these examples be any different? On the other hand, there seems an added normative reason why such a promise should be enforceable – because the promisor has already been benefited by the promisee - and I would suspect that most people would prefer the approach

taken in Myanmar. Certainly that was the preferred view of the Law Revision Committee in 1937 but the recommendations of that body have never been implemented in England and Wales.

(b) Part payment of a debt

In English law, it remains well-established that the part payment of a debt is not good consideration for a promise to waive (ie to forgo) the rest of that debt. It is only if the promisor obtains some additional advantage (eg that the debt is to be paid at an earlier time or is to be accompanied by some other benefit) that there is consideration for the promise.

The leading case is *Foakes v Beer* (1884) 9 App Cas 605. In August 1875, the defendant Mrs Beer, had obtained a court judgment against Dr Foakes for £2090 19s. Mrs Beer was entitled to interest on that sum until paid off. Dr Foakes asked for time to pay off the money and Mrs Beer agreed that, if he paid £500 immediately and £150 on two occasions each year until the whole sum had been paid, then she 'would not take any proceedings whatever on the said judgment'. Dr Foakes paid off the debt in accordance with the terms of that agreement. Mrs Beer then brought an action claiming the interest on the debt. Assuming that the true construction of the agreement was that Mrs Beer had promised to forgo her interest on the debt, the House of Lords nevertheless held that that promise was not binding on her because it was not supported by consideration. She was therefore entitled to the interest on the debt.

A more recent case applying the same rule is *Re Selectmove Ltd* [1995] 1 WLR 474.

In contrast, in Myanmar s 63 of the 1872 Act makes clear that a waiver of the performance owed is binding without the need for fresh consideration. It reads: 'Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him ... or may accept instead of it any satisfaction which he thinks fit.'

Illustration (b) given in the Act precisely applies this to part payment of a debt:

'A owes B 5,000 kayat. A pays to B, and B accepts in satisfaction, of the whole debt, 2,000 kayat paid at the time and the place at which the 5,000 kayat were payable. The whole debt is discharged.'

Again, the English law has been much criticised. It may be logical – as B is already entitled to the full debt, it may be argued that B is not receiving any new consideration in exchange for the waiver – but, on the other hand, one can also argue that B has the assurance that A is at least paying off some part of the debt owed and that might not otherwise be the case if the full original sum was insisted upon. Again therefore this is an example of the operation of the doctrine of consideration that has been criticised in England and Wales and reform was recommended by the Law Revision Committee. Having said that, there may be dangers of coercion or duress being put on the creditor by the debtor to accept a lesser sum and, subject to development by the courts to embrace the English concept of economic duress, it is not clear to me (and I discuss this further below) that the Myanmar concept of coercion (in s 15 of the 1872 Act) is sufficiently wide to cover the types of illegitimate coercion that might be brought to bear.

3. Privity of contract and third parties

A fundamental feature of the English common law of contract is that only the parties to the contract can enforce it. This is usually described as the 'privity of contract' doctrine although it is sometimes expressed by (and is virtually indistinguishable from) saying that 'consideration must move from the claimant'.

Example

A contracts with B to pay £1000 to C. If A fails to pay C, C cannot enforce A's promise even though C is the intended beneficiary of the contract because C is not a party to the contract (or, as alternatively expressed, C has provided no consideration for A's promise).

Two classic illustrations establishing or applying the privity/consideration must move from the claimant rule are *Tweddle v Atkinson* (1861) 8 B & S 393 and *Dunlop Pneumatic Tyre Co Ltd v Selfridge* [1915] AC 79.

In *Tweddle v Atkinson*, the fathers of a bride and groom, on the occasion of their offspring's marriage, contracted with each other for each to pay a sum of money to the groom. The groom was William Tweddle, his father was John Tweddle, and the father of the bride was William Guy. The contract was made in writing and included the following clause: 'it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified'. William Guy broke the contract and failed to pay William Tweddle the promised money. William Tweddle brought an action against William Guy's estate (William Guy had died) for the promised sum of £200. His claim failed because he was not a party to the contract (or, as it was expressed in the case, consideration did not move from him).

Dunlop Pneumatic Tyre Co Ltd v Selfridge concerned an attempt by Dunlop, a manufacturer of tyres, to ensure that its tyres were not sold below their list price. Every time it supplied tyres to a dealer Dunlop insisted, as a term of the contract of sale to that dealer, that that dealer's sales of the tyres should not be at a price below the list price and that, if they were, the dealer would pay £5 per tyre liquidated damages to Dunlop; and that the dealer would in turn extract the same undertaking from its purchaser. In this instance, the dealer was Dew & Co. In line with the agreement with Dunlop, when Dew & Co sold to Selfridge, the purchaser, it was a term of the agreement with Selfridge that Selfridge would not sell on the tyres at below the list price and that, if it did so, it would pay Dunlop £5 liquidated damages. Selfridge did sell on at below the list price and Dunlop brought an action for liquidated damages of £5 per tyre against Selfridge. This action failed because Dunlop was not a party to the contract with Selfridge (or, as alternatively expressed, it had not provided the consideration for Selfridge's promise). In the words of Viscount Haldane LC: 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract.'

In England, this privity rule has been criticised for many years and ultimately this has led to a recent statute, the Contracts (Rights of Third Parties) Act 1999, which in certain situations gives an expressly identified third party the right to enforce the contract.

However, it would appear that Myanmar law has no need for such a statute because, although there are references in the 1872 Act to the parties to the contract, there is nothing explicitly in the 1872

Act that prevents a third party intended beneficiary from enforcing the contract and nowhere is it specified that consideration must move from the claimant. Moreover, the definition of consideration in s 2(d) of the 1872 Act includes consideration that moves from a third party rather than from the promisee. That reads, with my italics:

‘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.’

Although one might take the view that it would be odd for such a fundamental aspect of English contract law to be rejected in Myanmar – and it is true that the Privy Council on an appeal from Malaysia in *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, after considering a conflict of view on this point in the courts in India, held that privity did apply in Malaysia which also has the 1872 Act – it would appear that the Myanmar courts have taken the arguably more straightforward, and in principle desirable, view that privity of contract is not a fundamental feature of Myanmar law. See *Daw Po v U Po Hmyin* (1940) RLR 239 and *Burma (Government Security) Insurance Co Ltd v Daw Saw Hia* (1953) BLRHC 350.

Note however that if this analysis is correct, and if the law in Myanmar is contrary to the English common law of contract on privity, the recent statutory reform in England has brought English law into line with the essentials of Myanmar law. Of course, the English statute has details on the law of third party rights that are not replicated in the law of Myanmar. So there are statutory provisions on precisely which third parties can enforce (they must be expressly identified by name, class or description), the extent to which the original parties can change the contract, and the defences open to a promisor when sued by the third party. In that sense there remain differences of detail.

4. Exemption clauses

A major theme of modern English contract law has been the need to control the abuse of a stronger bargaining position. The most obvious example of this abuse has been the insertion in standard contracts between a business and a consumer of clauses which exclude or limit the business party’s liability for breach of contract (or other liability). A consumer will not usually read the small print of the contract but in any event does not have the bargaining power or the opportunity to renegotiate the contract.

The English common law of contract has reacted to this problem in two ways. First, it has often sought to ensure that the exemption clause is not part of the contract and is therefore of no effect. This is the ‘non-incorporation’ technique. The second is to interpret the words of the contract in such a way that the exemption of liability does not apply to the breach in question. This is the ‘interpretation’ technique.

An example of the former is *Chapelton v Barry UBC* [1940] 1 KB 532. The claimant hired two deckchairs from the defendants. The chairs were in a pile beside which was this notice: ‘Barry UDC...Hire of chairs 2d per session of three hours’. The claimant received two tickets from the attendant on payment of the 4d. He glanced at the tickets and slipped them into his pocket, having no idea that there were clauses on those tickets. One of the clauses read: ‘The Council will not be liable for any accident or damage arising from hire of chairs.’ While using one of the chairs, the

claimant was injured and he brought an action claiming damages for negligence (whether in tort or contract) against the defendants. The Court of Appeal, overturning the trial judge, held that, as the ticket was a non-contractual document, the exclusion clause was not incorporated into the contract.

An example of the second is *Canada Steamship Lines Ltd v R* [1952] AC 192. The claimants' goods were stored in a shed leased from the Crown (the defendant). They were destroyed by a fire caused by the defendant's negligence. By clause 7 of the lease 'the lessee shall not have any claim...against the lessor for ...damage...to... goods... being... in the said shed.' The Privy Council held that that exclusion clause did not exclude liability for the defendant's negligence. Rather, as a matter of interpretation, the clause did not apply to negligence by the defendant but rather applied only to exclude liability for damage to the goods caused by breach of the defendant's strict obligation to keep the shed in repair.

It can be seen immediately that both those common law techniques are strained. Often the exclusion clause is plainly incorporated into the contract and, as a matter of interpretation, applies to what has happened. What was really required therefore was a law which allowed the courts to strike down unreasonable exemption clauses especially to protect consumers. It was this that was introduced by statute in the form of the Unfair Contract Terms Act 1977.

Myanmar contract law, without such a statute, appears to be stuck with doing the best it can with the common law techniques. But, even if they are applied, they will often leave the consumer or weaker party unprotected against harsh and unfair contract terms.

5. Interpretation

How does one interpret a contract? This is of great practical importance and, indeed, most contractual disputes turn on this question. There have been very important recent developments in English law so that, instead of the old literal or dictionary approach to interpretation, the courts now apply an objective and contextual approach. By this, the courts seek to ascertain what the 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. This modern approach to interpreting a contract was laid down by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL.

Yet there is nothing at all in the 1872 Act on the interpretation of a contract. Will the Myanmar courts follow the modern English approach? We simply do not know.

There are other distinctive features of the modern English approach. For example, in a commercial context, where there is more than one plausible meaning, the commercially more sensible meaning is to be preferred. This was accepted by Lord Hoffmann in *Investors Compensation Scheme* (see especially his fifth principle) and was further clarified in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. Lord Clarke at [43] said: 'if the language is capable of more than one construction, it is not necessary to conclude that a particular construction would produce an absurd or irrational result before having regard to the commercial purpose of the agreement.' And earlier at [21] he said: 'The language used by the parties will often have more than one potential meaning... the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background

knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.'

However, in interpreting a contract, the English approach (contrary, for example, to the law in the USA) is that one must exclude from the admissible background the pre-contractual negotiations of the parties. This was accepted by Lord Hoffmann in *Investors Compensation Scheme Ltd* (see his third principle) and was confirmed after detailed analysis by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101. That exclusion is controversial because it conflicts with the normal way in which language is interpreted (which takes account of prior dealings) and Lord Hoffmann accepted that such evidence could be relevant. The exclusion was based on the grounds that to allow in such evidence would result in an unacceptable increase in the cost of dispute resolution and might encourage self-serving statements. While most practitioners appear to support this reasoning, the exclusion has been criticised by a number of commentators including McMeel, 'Prior Negotiations and Subsequent Conduct – the Next Step Forward for Contractual Interpretation' (2003) 119 LQR 272; and Lord Nicholls, 'My Kingdom for a Horse – The Meaning of Words' (2005) 121 LQR 577.

However, *Chartbrook Ltd v Persimmon Homes Ltd* recognised that pre-contractual negotiations may be taken into account for (a) rectification (b) estoppel preventing denial of a particular meaning and (c) establishing that a background fact was known to the parties. It can be argued that the fact that the first of those is commonly pleaded as an alternative to interpretation tends to undermine the cost objection to allowing in such evidence (ie it will have to be considered by the parties, and looked at by the court, in any event).

Again we do not know the answer to the question, does the Myanmar law on interpretation of contracts exclude the evidence of pre-contractual negotiations?

6. Implied terms

We know from the Myanmar Sale of Goods Act 1930 that Myanmar law embraces the idea of implied terms. The implication of terms by statute is of great practical importance in England and Wales and presumably in Myanmar. Most contractual claims in respect of defective goods are based on a breach of one of the terms implied by statute. In this jurisdiction, as regards the sale of goods, by the Sale of Goods Act 1979 terms are implied as to, eg, title (s 12), correspondence with description (s 13), quality or fitness (s 14), and in respect of sales by sample (s 15). So, for example, by s 14(2) of the 1979 Act, 'Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality'. And by s 14(3) of the 1979 Act, where the seller sells goods in the course of a business and the buyer makes known any particular purpose for which the goods are being bought: 'There is an implied term that the goods supplied under the contract are reasonably fit for that purpose' (except where the buyer does not rely on the seller's skill or judgment). There are equivalent terms implied into contracts by the Myanmar Sale of Goods Act 1930.

However, what about other types of implied term, eg terms implied, as a matter of fact, by the courts)? Do they exist in Myanmar? Certainly there is no mention of them in the 1872 Act.

Recently the approach to the courts implying terms by fact (which rest on the parties' objective intentions) was recast by Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, PC. Prior to that case the English courts tended to refer to one of two tests in implying terms by fact: the 'officious bystander' test as set out by MacKinnon LJ in *Shirlaw v Southern Foundries (1927) Ltd* [1939] 2 KB 206, 227; and, most commonly, the 'business efficacy' test established in *The Moorcock* (1889) 4 PD 64, CA. Lord Hoffmann in the *Belize* case explained, at [21], that those tests are underpinned by the single underlying question of 'what the [contract], read as a whole against the relevant background, would reasonably be understood to mean.' In subsequent cases (see, eg, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc, The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639) the courts have often continued to find it useful to refer to the business efficacy test but have indicated that that test must be seen as merely a help in answering Lord Hoffmann's underlying question; and the same can presumably be said of the 'officious bystander' test.

It is of importance to appreciate that, although English law does not impose a free-standing duty to perform a contract in good faith, it often comes to the same result by implying a term that performance must be carried out in good faith: see, eg, *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111. Somewhat similarly, in a number of cases, it has been held that express contractual discretions are subject to an implied term that the discretion must not be exercised arbitrarily, capriciously or irrationally: eg, *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685; *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151, [2007] 2 All ER (Comm) 825; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 16, [2008] 1 Lloyd's Rep 558. See generally Hooley, 'Controlling Contractual Discretion' [2013] CLJ 65.

Does Myanmar contract law recognise such implied terms or does it have a free-standing duty to perform a contract in good faith? Again, we do not know.

7. Innominate terms

We know that Myanmar law recognises a distinction between conditions and warranties because that distinction is included within the Sale of Goods Act 1930. A condition is a major term of the contract any breach of which entitles the innocent party to terminate the contract. A warranty is, in contrast, a minor term of the contract such that no breach will entitle the innocent party to terminate the contract.

However, in his seminal judgment in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, CA, Diplock LJ recognised that there is a third type of term. An innominate term (sometimes referred to as an 'intermediate term') is neither a condition nor a warranty. Where a term is innominate, the question as to whether the contract can be terminated turns on the seriousness of the consequences of the breach rather than on the importance of the term broken. In deciding whether the consequences are sufficiently serious, Diplock LJ's test from the *Hongkong Fir Shipping* case is whether the innocent party is being deprived of substantially the whole benefit of the contract. He said, at 70:

'There are...many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties"... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract.'

See also Sellers LJ at 63-64 who spoke of whether the breach goes 'to the root of the contract'. For further helpful discussions, see *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, CA; *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377; *Urban I (Blonk St) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756, esp at [44]

The advantage of a term being classified as a condition is that the innocent party knows for certain that it can terminate on breach. This desire for certainty no doubt explains why, in commercial contracts, 'time clauses' are often conditions: see *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, CA; *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711, HL; *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta), The Seaflower* [2001] 1 Lloyd's Rep 341, CA; *Kuwait Rocks Co v AMN Bulkcarriers Inc, The Astra* [2013] EWHC 865 (Comm), [2013] 2 All ER (Comm) 689. However, the default position is that 'time is not of the essence' in contracts for the sale of land (Law of Property Act 1925 s 41) or for clauses requiring payment in a contract for the sale of goods (Sale of Goods Act 1979 s 10).

Does Myanmar contract law recognise the innominate term or is it stuck with terms being either conditions or warranties? This is another question on which there is no clear answer.

8. Damages for non-financial loss

The relevant provisions on damages in the Myanmar Contracts Act 1872 ss 73-75 appear to be confined to compensating for financial loss. In English law, there have been developments such that compensatory damages may now be awarded in certain circumstances for mental distress and the like. Three leading cases can be referred to in illustrating the position.

Jarvis v Swan's Tours Ltd [1973] QB 233, Court of Appeal

The claimant booked a Christmas skiing holiday with the defendants for £63.45. The defendants' brochure described the hotel as being a 'House Party Centre' so that the price included welcome party, afternoon tea and cake, fondue party, yodeller evening and chalet farewell party. In fact there were only 13 people in the hotel in the first week and in the second week the claimant was the only guest. Nor did the skiing correspond to what was said in the brochure. In an action for breach of contract, it was held that the sum of damages should be increased to cover his mental distress as this was an exceptional case where mental distress damages could be awarded.

Watts v Morrow [1991] 1 WLR 1421, Court of Appeal

The claimants bought a second home in the country in reliance on a survey prepared by the defendant surveyor. That survey was negligently prepared and failed to mention some substantial defects which required urgent repair, including the renewal of the roof, windows and floor boards. In an action by the claimants for breach of the defendant's contractual and tortious duty of care, the

trial judge awarded each claimant £4,000 as damages for distress and inconvenience (in addition to the damages for their pecuniary loss). On appeal by the defendant against the amount of damages, the Court of Appeal confirmed that contractual damages for mental distress are recoverable in two exceptional categories—distress consequent on inconvenience being one—but reduced the amount here awarded for distress and inconvenience to £750 for each claimant.

Bingham LJ: *A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered.

Farley v Skinner [2001] UKHL 49, [2002] 2 AC 732, House of Lords

The claimant was considering buying a house (Riverside House) 15 miles from Gatwick Airport. He engaged the defendant to survey the property and specifically asked him to investigate whether the property was affected by aircraft noise. In breach of his contractual duty of care, the defendant reported that it was unlikely that the property would suffer greatly from aircraft noise. After buying the property and moving in, the claimant discovered that aircraft bound for Gatwick flew directly over, or nearly over, the house and that the noise substantially affected the property and was ‘a confounded nuisance’. Nevertheless he decided not to sell. Moreover, he was found to have suffered no financial loss in that he had paid the market value of the property where that value took into account the aircraft noise. Nevertheless he sought mental distress damages for the defendant’s breach of contract because his enjoyment of the property was detrimentally affected. The House of Lords, in restoring the first instance judge’s award of £10,000 for his mental distress, held that these facts fell within both of the exceptional categories where such damages can be awarded.

Will Myanmar contract law award such damages for non-pecuniary loss in these types of case? The answer is again unclear.

9. Economic duress

The Myanmar Contract Act 1872 s 15 deals with the law on ‘coercion’. This is equivalent to the English law of what is now termed duress. However, in recent times the most important aspect of duress in English law which has featured in most of the recent cases, has been economic, rather than physical, duress; and the economic duress has been constituted by threatened breach of contract.

See, eg, *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; *Pao On v Lau Yiu Long* [1980] AC 614, PC; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; *Atlas Express Ltd v Kafco Ltd* [1989] QB 833; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530; *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3481 (QB); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep 653. It remains unclear precisely when a threat to break a contract will constitute duress. No single approach can reconcile all the cases. The best approach is probably to say that every threatened breach of contract is illegitimate and that the ambit of economic duress is controlled by causation and by insisting in this context on the additional requirement that the claimant had no reasonable alternative other than giving in to the threat.

But in Myanmar, it would appear that the law of coercion, as set out in the 1872 Act, is confined to physical coercion. There is certainly no scope in the words of s 15 for economic duress. Again we have an unanswered question: will the Myanmar courts follow English developments on economic duress?

10. The Law of Unjust Enrichment

Unjust enrichment is a newly recognised subject in English law. It covers, for example, the recovery of money paid, or the value of work done or the value of goods supplied, by mistake or under duress or under a contract that is void or voidable or anticipated or that has been discharged for breach or frustration. The bulk of the subject comprises that area of the common law that used to be called quasi-contract. It includes the situations set out in the Myanmar Contract Act 1872 Chapter V ss 68-72 under the heading 'Of Certain Relations Resembling Those Created by Contract'.

English law, like Myanmar, traditionally did not recognise unjust enrichment. So on the traditional approach, the above areas were treated as having no relationship to each other; and spurious theories, like the fictional implied contract theory were put forward to explain much of the law. If C paid D £2000 under a mistake of fact, his legal remedy to recover the £2000 was said to rest on D's implied promise to him to pay it back. This explains the title 'quasi-contract' and, analogously, the heading to ss 68-72 in the 1872 Act ('resembling ...contract'). But this is fictional in failing to explain why the promise should be implied or why there is liability because the relationship resembles contract. There precisely is no contract governing this situation. The best answer, accepted now in English law and in most common law and civil law jurisdictions, is that the defendant has been unjustly enriched at the expense of the claimant and restitution is concerned to reverse that unjust enrichment.

Does Myanmar law recognise a law of unjust enrichment or is it stuck with the outdated fictional link to contract? Again, we do not know.

11. Conclusion

This article has sought to explain the difficulties, the fascination, and the frustrations, involved in trying to understand Myanmar contract law and how far it differs from modern English contract law. Any assumption that the general law of contract in Myanmar can simply be found and understood by reading the 1872 Contract Act must be dispelled. Although that Act has many virtues, it was never

comprehensive and, although largely – albeit, as we have seen, with some significant differences - a codification of English contract law at the time, there have inevitably been many important developments in English contract law in the last 140 years. The burning question is, therefore, what is Myanmar contract law where the 1872 Act does not apply, or is out of date, and there is no other statute in play. Will the Myanmar courts, relying on underpinning principles of ‘justice, equity and good conscience’ apply modern English contract law (or perhaps Indian contract law) to fill the gaps or to give a progressive interpretation to the 1872 Act? Further research is needed to answer that central question. Certainly an answer is urgently needed if those seeking to enter into contracts in Myanmar are to feel confident that the domestic contract law of Myanmar is fit for purpose.