

HONG KONG LEGAL PRINCIPLES

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Important Topics
for Students and
Professionals

STEPHEN D. MAU

Second Edition

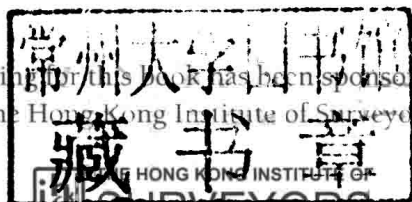
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Stephen D. Mau

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Hong Kong Legal Principles

To my family, my parents and my brother

Foreword

The Hong Kong Institute of Surveyors strives to serve the surveying profession in Hong Kong since its establishment in 1984. In 2010, the Institute began sponsoring publication of reference books that are more relevant to local surveying practice and needs. The Institute is delighted that the first title funded by the scheme, *Hong Kong Legal Principles: Important Topics for Students and Professionals, Second Edition*, written by Stephen D. Mau, is not only written for the surveying industry and students, but is also a useful reference for non-legal professionals and the general public in Hong Kong.

The landscape of the real estate and construction industry has changed in recent years; these changes are reflected in the booming development of the construction industry, the adjustment of property pricing, and the growing concern over rights protection for employees and consumers. In response to these recent changes, this revised edition of *Hong Kong Legal Principles* includes a wide range of examples and cases to illustrate the legal principles to non-legal students and professionals. It is written in accessible language and the notes and references have also been expanded extensively.

This book comprises four chapters, namely, Contract, Tort, Employment and Property, which are relevant to both professionals and lay readers. It is also an excellent reference for undergraduate and postgraduate students who are studying courses related to the field.

Sr Serena Lau

President, 2011–12

The Hong Kong Institute of Surveyors

Foreword

I am delighted to be able to write the foreword for the second edition of this book. I have known Stephen Mau for a number of years as a friend and a few years ago as a colleague collaborating in a major construction arbitration held in London and Hong Kong.

I started off my career as a civil engineer with a firm of consulting engineers. As with many other professionals I became involved in issues which required knowledge of legal principles. Dealing with claims for payment or extensions of time needed an understanding of contract terms. Questions of ownership of plant and materials when a contractor becomes insolvent raised more complex legal issues which can only be understood from the perspective of wider legal principles. My interest in these principles led me to an interest in the law and later a career as a barrister. This book may lead others along that path. It provides an excellent introduction to the general legal principles of contract and tort, as well as dealing with aspects of employment and property law. Whilst the book is written from the perspective of Hong Kong law, the fundamental common law principles are generally applicable to all those jurisdictions where that common law system applies.

Each of the chapters sets out the issues in a manner which is easy to understand and which gradually builds up the knowledge of the reader on each subject. For instance, the chapter on contract law starts by defining what is meant by a contract and reviews the various ways in which contract may be formed. It then continues with an analysis of how contracts are created before looking at breach, termination and remedies in damages. Usefully it illustrates the principles by referring to particular Hong Kong decisions where the principles have been set out or applied.

The chapter concerned with the law of tort concentrates on the main torts governed by the common law but also refers to particular statutory torts in Hong Kong. By analysing, in detail, the law of negligence, Stephen

has provided an excellent introduction to the approach of the courts in deciding when liability in tort will be imposed. This is a difficult area and the views of judges in different jurisdictions have not always coincided. In addition, the existence of a duty of care is fact sensitive.

The chapters on employment and property law provide a practical analysis of Hong Kong law in these areas. Once it has been established that a person is an employee many of the responsibilities and liabilities are contained in particular ordinances and subsidiary regulations. In relation to property law both personal and real property are dealt with, with a section which analyses issues relating to land. There is also reference to the new land registration system being developed in Hong Kong.

Stephen has brought out practical aspects to the principles by presenting a number of scenarios which, from the time I have spent in Hong Kong over the years, is appropriately based on restaurants. They pose a number of problems which can be resolved by applying the principles in the book. Fortunately, my experience of eating in restaurants in Hong Kong has not raised the problems encountered at the hotpot restaurant.

This book therefore provides a comprehensive and easily understandable introduction to the law. Stephen is to be commended for having produced such a popular book. I am certain that the popularity will continue. Knowledge of general principles is now an essential part of education and training. The book should therefore form part of the necessary reading for students and professionals qualifying in a wide range of subjects.

Sir Vivian Ramsey
Judge of The Technology and Construction Court
The Rolls Building, Royal Courts of Justice, London
August 2012

Foreword

Law has become inexorable in its progress. An inevitable feature of our existence is that, however we might wish it to be otherwise, the law is very much with us late and soon.

Consequently, it is hardly surprising that there are many students in Hong Kong who need to acquire a basic knowledge of the civil law to obtain a particular qualification or certificate. There are others who wish to study the law to know more about their rights and obligations in day-to-day commercial transactions.

The present situation poses a challenge. How does one communicate what the civil law is about to the many different classes of persons in search of guidance? Only a minority of the population (those wishing to be barristers, solicitors or law professors) will need to know the law in all its depth and subtlety. For most of us, what we ideally yearn for is a short one-volume summary of the basics.

But this last ideal is easier said than done. A book should not be so brief and simplified in its account of legal principle as to be misleading. In that case, too little knowledge could do more harm than no knowledge at all. On the other hand, overly pedantic detail would hinder a lay person from obtaining a sound grasp of key principle. One would not see the proverbial forest because there are just too many trees.

Stephen D. Mau's *Hong Kong Legal Principles: Important Topics for Students and Professionals* strikes the delicate balance between too much and too little, in a robust and practical manner. It does this by sub-dividing the essentials of civil law into 4 principal subjects: contract, tort, employment law and property.

The importance of contract and tort are self-evident. Contract tells us what constitutes a valid agreement; when an agreement may be refused enforcement; and what remedies may be granted when an agreement is

breached. Tort, on the other hand, stipulates when a person may owe duties or be liable to another despite the absence of an agreement.

Employment law is, to a great extent, a specific illustration of how the laws of contract and tort operate, in conjunction with statute, to regulate one of the most important social relationships of our everyday life: the relationship of employer and employee.

Finally, property reflects a concern of most individuals in Hong Kong and elsewhere. It tells us how we acquire rights or incur obligations in respect of personal things and in respect of land. Property is an important example of how contract law interacts with equitable principle to create a body of rules which impact on our daily lives.

The first edition of Stephen D. Mau's book has proved to be much in demand. This second edition is likely to share the same fate.

Stephen D. Mau is thus to be commended for producing a book which is neither too much, nor too little. Instead, this book attempts to steer the reader, step by step, into a greater and deeper understanding of the law that governs our dealings with each another.

A. T. Reyes

Retired, Former High Court Judge in Charge of the Construction and Arbitration List

Hong Kong

1 September 2012

Preface to the Second Edition

In 2006, I perceived a need for a general text on Hong Kong law for students and professionals in different commercial fields. In many professions, legal knowledge is essential or required for someone wishing to obtain a qualification. Legal principles are also vital in the daily operations of various business and commercial entities. However, understanding the law is usually not a simple subject for someone who is not a legal practitioner. The idea of creating a concise and useful tool for students and non-legal professionals to become familiar with the law resulted in the publication of the first edition of this work. After several years, that need seems to remain while our law, both the common law and the statutory law, continues to evolve with Hong Kong's dynamic society. I believe that now is the time to update this book so as to ensure that this tool remains as a helpful guide to the changing legal environment. Like the first edition, this second edition has the same goals and aspirations. These goals and aspirations include presenting a publication which provides coverage of the most commonly encountered legal areas to be used as resource which is sufficiently detailed for general, "everyday" use without being too general or so detailed that each legal topic requires several volumes to cover. It is hoped that this purpose has been achieved.

The areas covered in this book include contract, tort, employment and property. While the law of contract governs the creation and operation of the legally binding agreements and it is fundamental in commercial transactions, the law of tort relates to the liabilities arising without an agreement, for instance, an action in negligence. On the other hand, employment law set out the principles that regulate the relationship between employers and employees. Employment law also demonstrates the often overlapping areas of law in that employment frequently involves matters of contract law and tort law. The last topic, property law, concerns the rights and duties relating to land and personal items and brings this publication full circle.

in the sense that much of property conveyancing involves agreements and contract principles.

Although expanded and with some re-organization within each chapter, the overall organization of the second edition remains the same as the original publication. The more common law oriented subjects are presented first, transitioning to the more statutory law oriented topics. A summary of the principal legal concepts are presented in the main text with a more detailed discourse or explanation set out in the footnotes with citations to sources where additional and more comprehensive information may be found.

The law in Hong Kong has changed since the first edition. The second edition aims to include and to explain these changes through referral to court cases interpreting and applying the law and to the actual legislation. I have endeavored to state the law as of December 2010.

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