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Fundamentals of
Legal Aspects in Arts Groups:
Contract Law -
Artists Contract & Employment
of Children Regulations

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Agenda

- Contract law – Fundamentals
- Artist Contract
- The law on employment of children



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Contract law – Fundamentals

Contract law – Conceptual Framework



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Formation /
Validity of
Contract

Vitiating
Factors?

Breach?

Remedies

Contract law – Formation / validity of contract



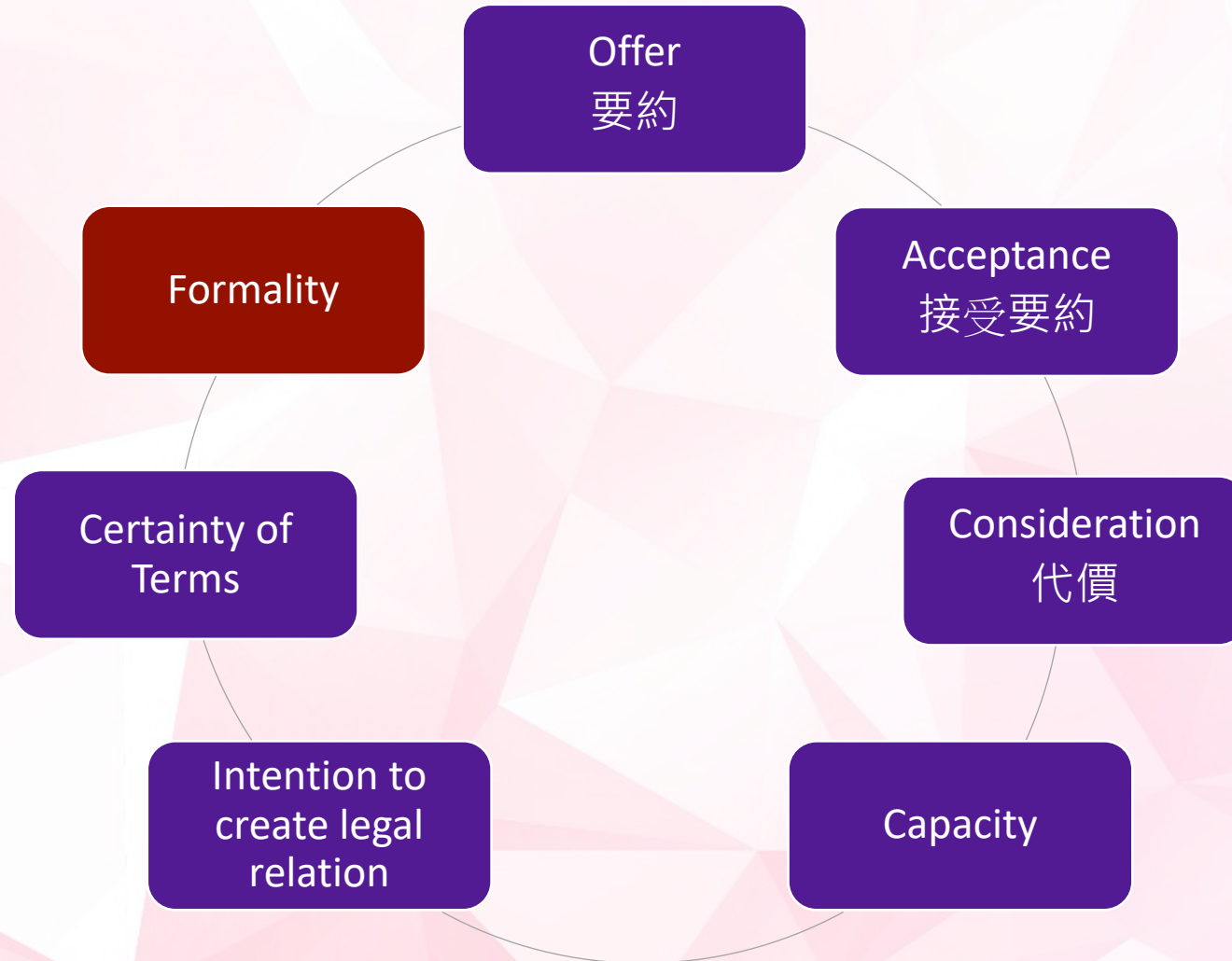
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Contract law – Formation / validity of contract

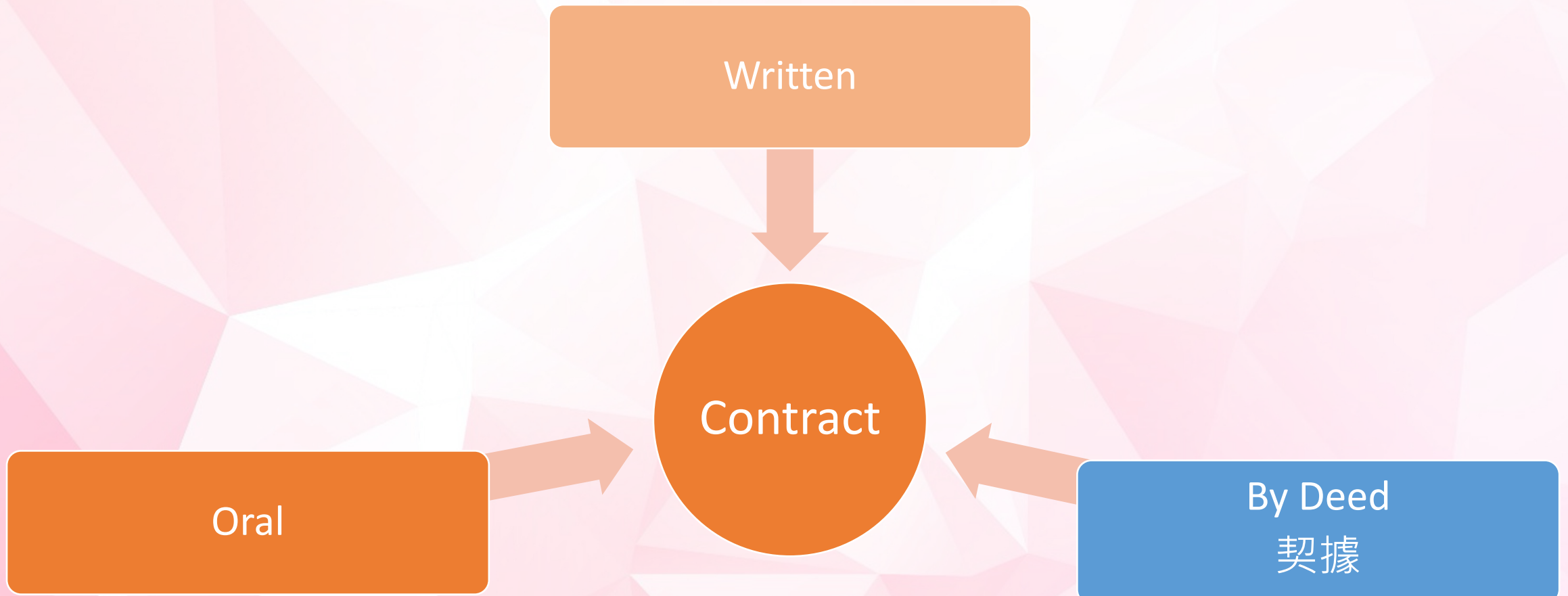


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Contract law – Formality

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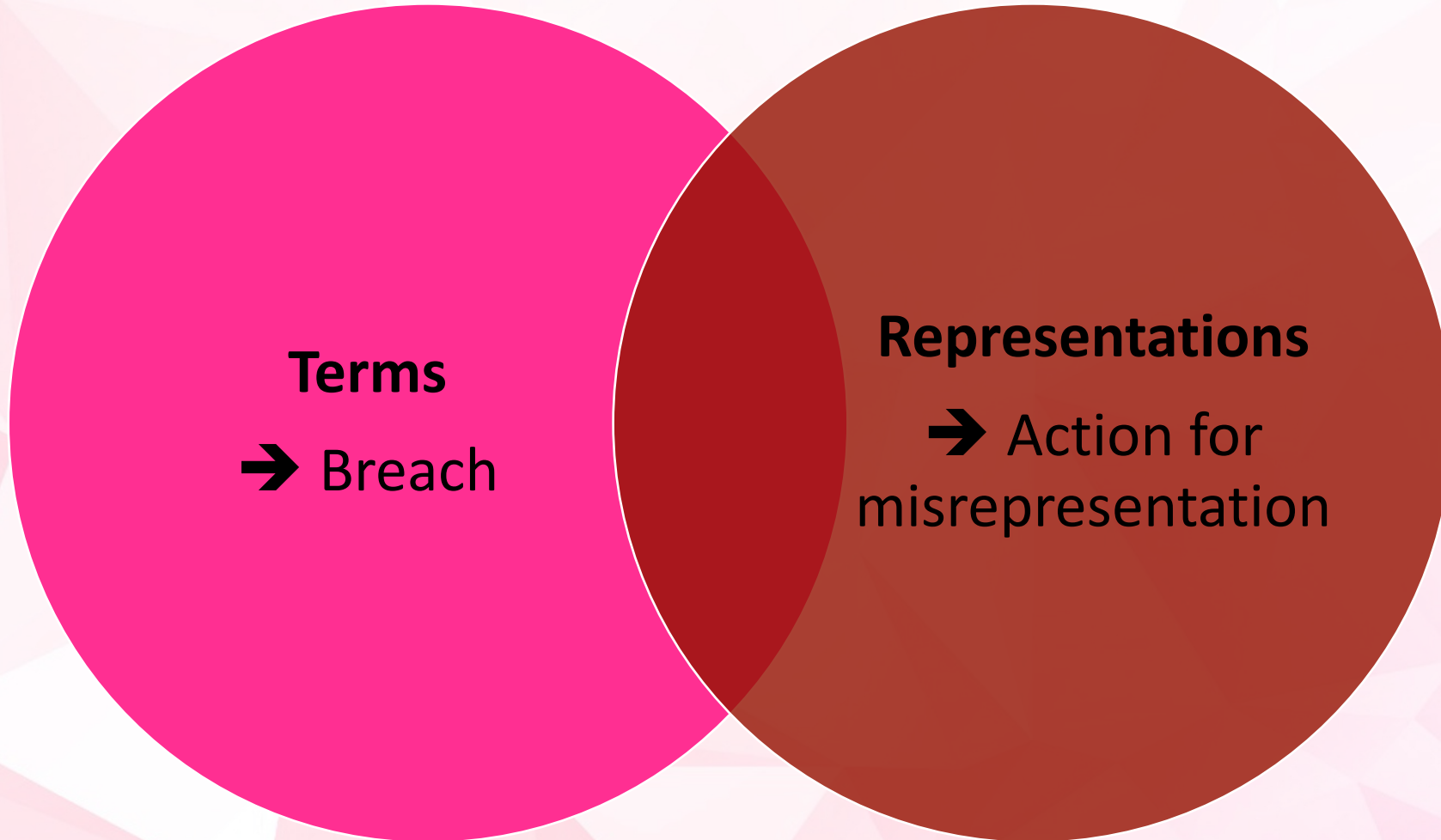
AAA Music and AAA Theatre have entered into an “MOU” (Memorandum of Understanding) in relation to a musical production. Is the “MOU” binding on the parties?

How is an MOU different from a contract / agreement?

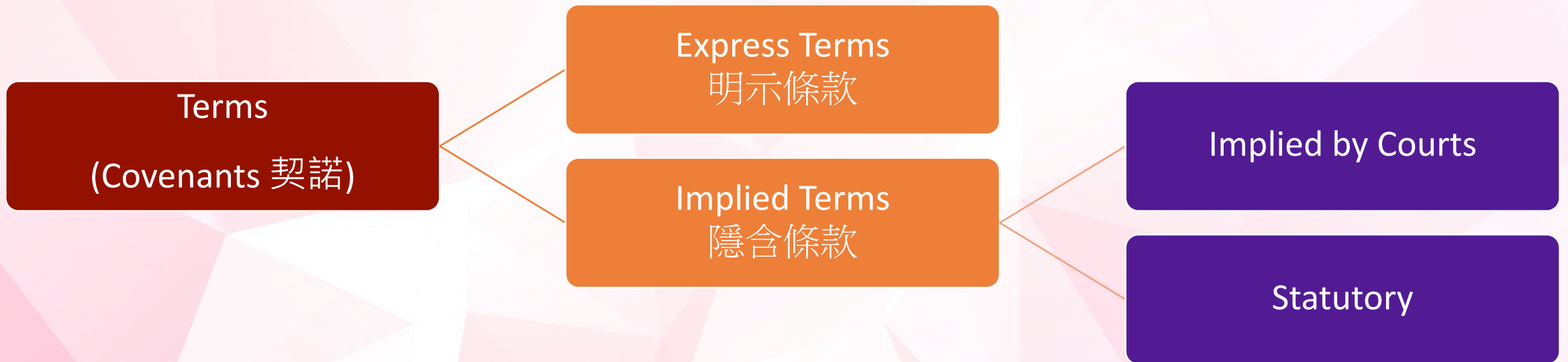
What about a provisional contract?

Contract law – Contents of contract

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Contract law – Terms



Contract law – Express Terms



- Incorporation by:
 - Signature
 - Notice
 - Course of dealing
- Rule against parol evidence, except:
 - Interpretation
 - Collateral contract
 - Implied terms



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Contract law – Terms implied by Courts

- Necessity
- Factual circumstances
- Test(s):
 - Business Efficacy Test
 - Officious Bystander Test
- Terms implied by customs

Contract law – Statutory implied terms

- Sale of Goods Ordinance (Cap. 26)
 - Good title
 - Correspondence with description
 - Merchantable quality 可商售品質
 - Fitness for purpose
 - Correspondence with sample and reasonable opportunity of comparing the bulk with sample
- Supply of Services (Implied Terms) Ordinance (Cap. 457)
 - Reasonable care and skill
 - Reasonable charge

Contract law –
Cross-border transactions /
services

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Jurisdiction Clause
司法管轄條款

Arbitration Clause
仲裁條款

Governing Law / Applicable Law
適用法律

Contract law – Some special terms

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Exclusion / Limitation
Clauses
免責條款

Force Majeure
Clauses
不可抗力條款

Indemnity Clauses
彌償條款

Contractual Discharge
/ Termination Clauses
解除條款

Agreed Sum

Liquidated Damages
算定賠償

Contract law – Conceptual Framework

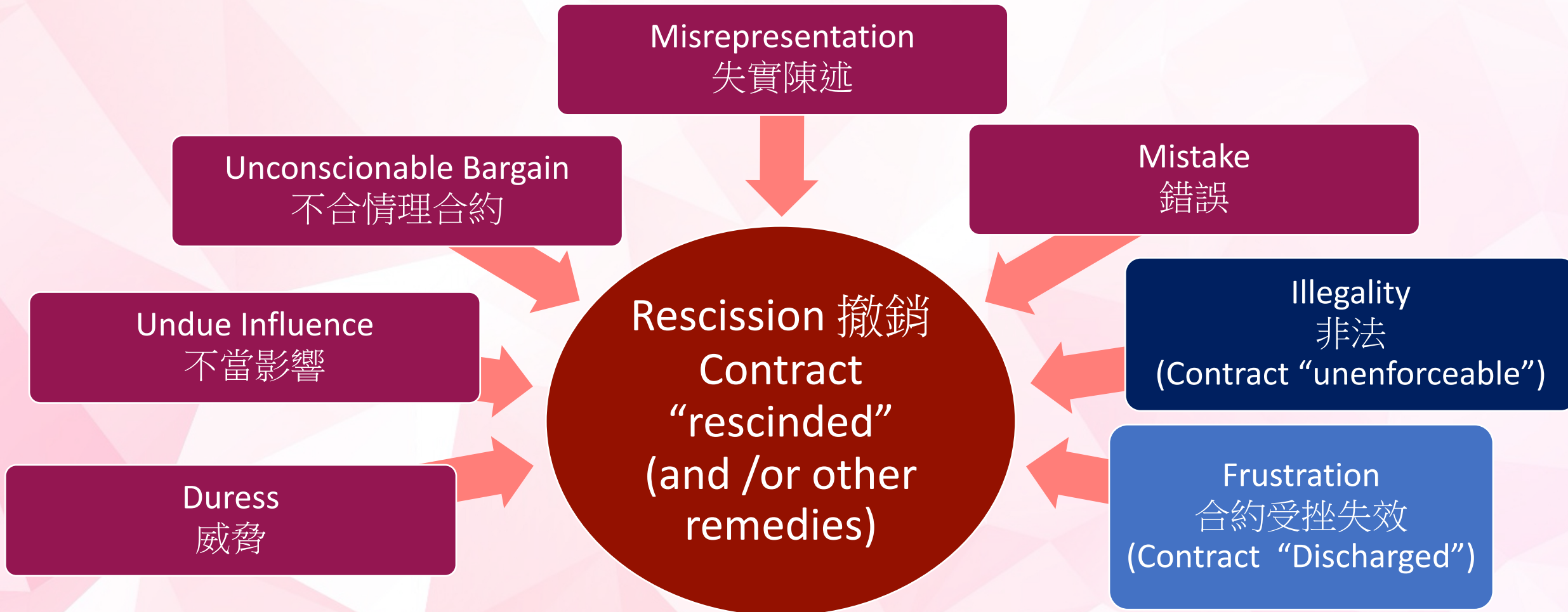
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Contract law – Vitiating factors – Termination by rescission



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Contract law – Common law doctrine of frustration

- Operates to **discharge** a contract where there is an occurrence (or in some cases, a non-occurrence) of some events **beyond the control** of the parties, for example, where **performance of the contract became physically or legally impossible** or too radically different from the original purpose of the contract.
- **No fault** of any of the contracting parties
- Consequential adjustment of rights and liabilities of parties to frustrated contracts – s16 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)
 - All sums paid or payable are recoverable
 - May allow retention of money paid / recover in part if expenses were incurred
 - Payment for valuable benefit obtained
 - “as the court considers just”
- NOT Applicable if there are force majeure clause(s)

Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754



- In Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754, the Court considered whether the **SARS epidemic** in 2003 operated as a frustrating event. There, a **tenant of a 2-year lease** sought to invoke the doctrine when he was subjected to a **10-day SARS-related isolation order**.
- This argument was rejected by the Court, which decided that a **10-day period was insignificant in view of the 2-year duration of the lease**, and although SARS may arguably be an unforeseeable event, it did not “**significantly change the nature of the outstanding contractual rights or obligations**” of the parties in this case.

The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975



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- In The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975, the Court considered whether the defendant (tenant) could rely upon the defence of frustration in contesting a claim for rents. According to the defendant, the frustration ground was based on the Social Unrest and the COVID-19 Pandemic.
- Frustration of a contract takes place where there supervenes an event (without default of either party, and for which the contract makes no sufficient provision) which so significantly changes the nature of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances.

The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975



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- This is a case which can be characterised as a failure of common purpose case — in gist, D, as the recipient of the use of the Premises, claims that the supplier’s (ie, the landlord’s) performance of providing the Premises to be no longer of any use for the common purpose of the parties, ie, to run a luxury watch retail store.
- The Court rejected the defence and found that there was **absent** a “common purpose” that the Premises would be commercially viably operated as luxury watch retail stores

The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975



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- (a) The high watermark of D's case is that there is a restriction of purpose clause, and other clauses that require D to maintain Premises to a particular standard. Such clauses, it is argued, shows that common purpose of the tenancy agreement is **the running of a luxury watch retail store.**
- (b) For present purposes, I am content to assume (without finding) that the clauses do show such a common purpose. However, as noted above, D **needs to go further.** The question is whether one can find that the true common purpose of the tenancy agreements is for something more: **to run commercially viable luxury watch retail stores on the Premises.**
- (c) With respect, I am unable to come to such a finding. To say that commercial viability of the business on the Premises is part of the common purpose of the tenancy agreements is another way of saying that both parties agreed to take risks over the lack thereof. Given **the landlord's wholesale lack of control over such business, it is simply difficult to see how, objectively speaking, the landlord can be taken to have agreed to bear such risks.**

The One Property Ltd v Swatch Group (Hong Kong) Ltd [2022] 1 HKLRD 975



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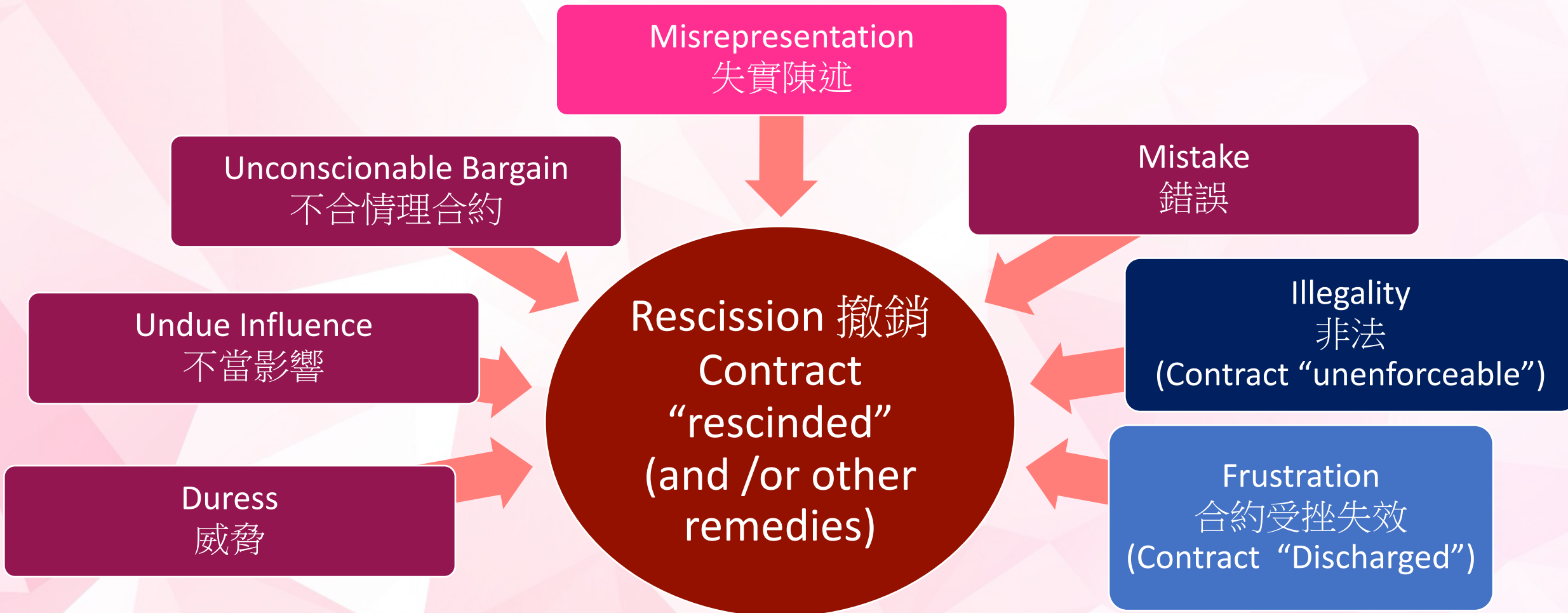
- (d) In an attempt to increase the nexus between the landlords and the business, D points to the fact that both tenancy agreements include turnover rent over and above a minimum basic rent — ie being the amount by which 10% of D's monthly gross receipts exceed basic rent. On this basis, **D argues that the landlords are not mere passive landlords — they are interested in the business venture on the Premises, and thus the viability of the business is also their concern.**
- (e) While I can see where D is coming from, I do not agree with the inference sought to be drawn. The argument may have some mileage had there been no minimum rent, but this is not the case. **The existence of a minimum rent in fact points right to the opposite** — while the landlord is happy to participate in profits if the business does spectacularly well, the minimum rent draws a clear line in the sand — insofar as D's business does not perform, the risk is placed squarely on D.
- (f) While D may lament the one-sidedness of the provision, this was what was agreed to. I am unaware of any legal doctrine in this context which suggests that, insofar as the landlord is to take the benefit of an upside, he must correspondingly bear the detriment of the downside.

AAA Musical's 5 shows in array
scheduled next week are cancelled due
to closure of LCSD venue in view of
COVID-19. Can AAA refuse to pay (i)
the stage production company, (ii) the
singers and dancers and (iii) the
photographer?

Contract law – Vitiating factors – Termination by rescission

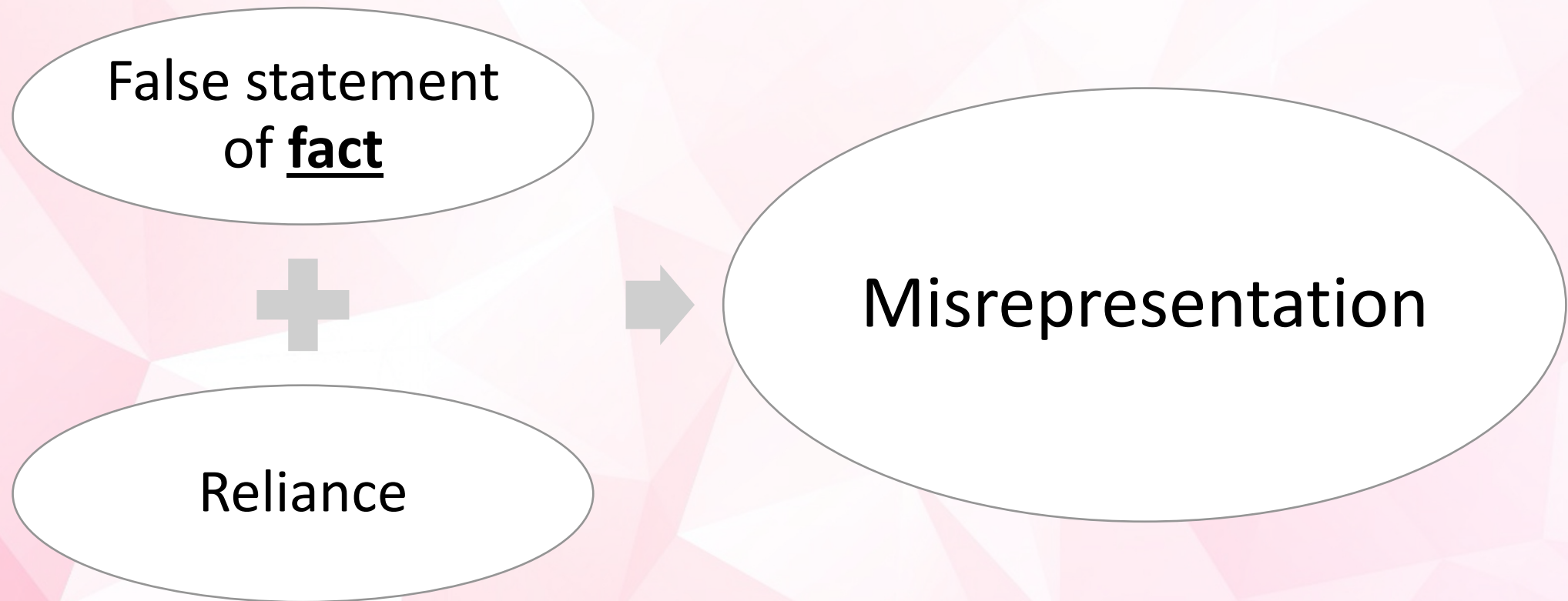


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Contract law – Requirements for actionable misrepresentation

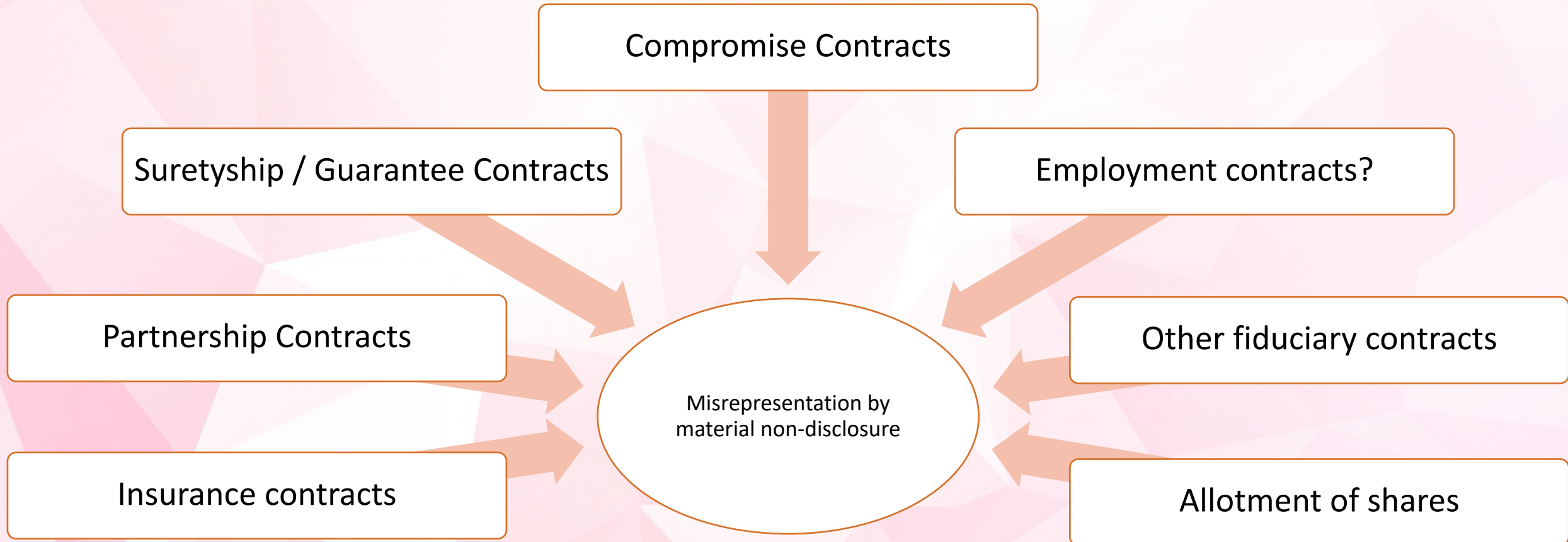
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Uberrimae fidei – Contract of
utmost good faith
Non-disclosure of material fact =
Misrepresentation?



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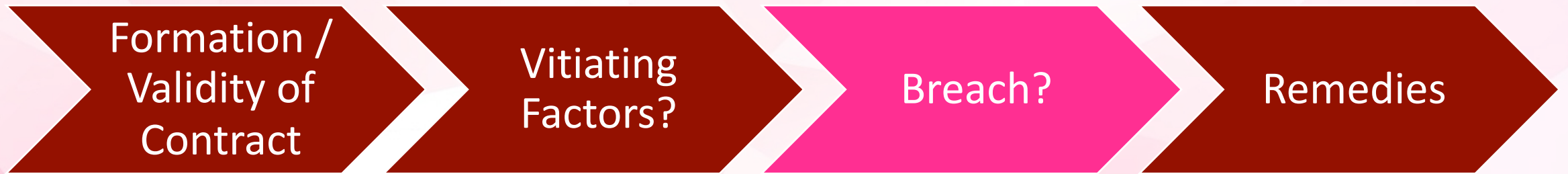
Misrepresentation

- Misrepresentation Ordinance (Cap. 284)
- Types:
 - Fraudulent misrepresentation
 - Negligent misrepresentation
 - Innocent misrepresentation
- Remedies: Damages + Rescission
- Void ab initio vs. Voidable

Contract law – Conceptual Framework



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Contract law – Breach of contract

- Breach of contract – Absolute liability
- Breach = Termination vs. Repudiation (悔約 / 不履行合約) ?
 - Condition vs. Warranty vs. Intermediate / Innominate Terms
 - Election: Affirmation vs. Acceptance of Repudiation
 - Waiver 豁免 / acquiescence 默許
 - Promissory estoppel 不容反悔

Contract law – Breach of contract



- One-off vs. continuous breach
- Anticipatory Breach?
- Remedies for breach vs. Alternative mode of performance
 - Agreed sum
 - Contractual discharge

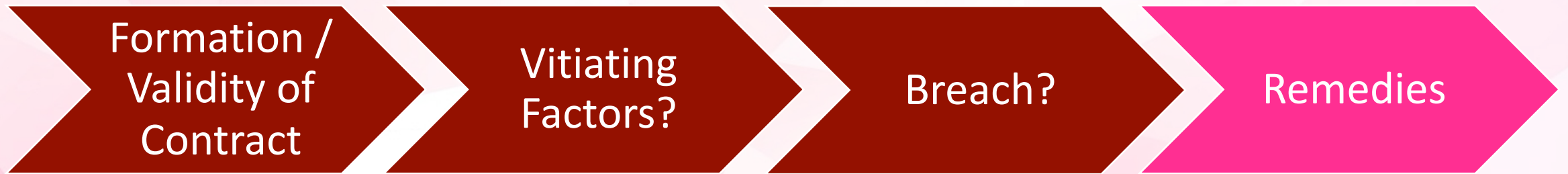
Contract law – Exemption Clauses

- Issue of incorporation
- Judicial control:
 - Rule of interpretation: *Contra Proferentem*
 - Control of Exemption Clauses Ordinance (Cap. 71)
 - Test of reasonableness
 - Consumer context?

Contract law – Conceptual Framework



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Contract law – Remedies



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Damages
損害賠償

Liquidated Damages
算定損害賠償

Agreed Sum?

Recovery of money
paid

Account of Profit

Quantum Meruit
and/or
Quantum Valebat
按照服務 / 合理計值

Specific Performance
強制履行

Injunction
禁制令



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If the contract does NOT provide the consequence of breach of contract (e.g. how the innocent party is to be compensated), what rights / remedies do the innocent party have?

Contract law – Variation of contract

- Contract to vary a prior contract
- Collateral contract?
- Issue of consideration
 - Promissory estoppel
- Supplemental Agreement
- Deed of variation / addendum



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Artist Contract



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Artist Contract

- The status of the art group – the legal personality
- Employment vs. Independent Contractor
- Sharing of income / profits / remuneration
- Outside work / restriction on competition
- Allocation of intellectual property rights
- Allocation of risks
- Governing law and dispute resolution
- Special issue: COVID-19



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Art group's status – the legal personality

- Limited company
 - Company limited by shares
 - Company limited by guarantee
- Sole proprietorship
- Partnership
- *Registered society?
- *Business registration?

Employment vs. Independent Contractor

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- Contract of service
 - Employment relationship
 - Employment / labour laws apply
- Contract for service
 - Independent contractor
 - 判頭
 - 自僱人士
 - “Freelancer”

Employment vs. Independent Contractor



- No single conclusive test of distinction
- Important implications:-
 - Applicability of employment law (both statutes and common law)
 - Personal injuries in the course of employment – common law claims and claims under the Employees' Compensation Ordinance (Cap. 282) ("**ECO**")
 - Insurance under ECO and insurance arrangement at all
 - MPF
 - Tax issues
 - Tax return and tax forms
 - Profits tax vs. salaries tax
 - **Business registration?**
 - Accounting provisions

Employment vs. Independent Contractor



- Control
 - Who decides on the matters of **recruitment and dismissal** of workers?
 - Who **pays for the workers' wages** and in what ways?
 - Who **determines the production process, timing and method** of production?
- Ownership and provision of factors of production
 - Who provides the **tools and equipment**?
 - Who provides the **work place and materials**?
- Economic considerations
 - Do the workers **carry on business on their own account** or carry on the business for their employers?
 - Are the workers involved in any **prospect of profit**, or are they liable for any **risk of loss**?
 - **How** are the worker's **earnings calculated and profits derived**?

Employment vs. Independent Contractor



- Criteria listed in Labour Department Q&A
 - control over work procedures, working time and method
 - ownership and provision of work equipment, tools and materials
 - whether the person is carrying on business on his own account with investment and management responsibilities
 - whether the person is properly regarded as part of the employer's organisation
 - whether the person is free to hire helpers to assist in the work
 - bearing of financial risk over business (e.g. any prospect of profit or risk of loss)
 - responsibilities in insurance and tax
 - traditional structure and practices of the trade or profession concerned
 - other factors that the court considers as relevant

Employment vs. Independent Contractor



- Indicators of independent contractor from a salaries tax perspective – Inland Revenue Department DIPN 25:
 - There is **no employment-type benefit** (e.g. money, annual leave, sick leave or pension) provided for the service carried out;
 - The service is not required to be carried out **personally** (e.g. can hire assistants/sub-contactors);
 - The performance of the service is **not subject to the control or supervision** that may be commonly exercised by an employer in relation to the performance of an employee's duties;
 - The remuneration is **not paid or credited periodically** (e.g. weekly or monthly) as is common with employment contracts;
 - **Neither** the service provider nor the receiver **has the right to terminate the service contract before the expiry of the contract** or before the job finished, by giving prior termination notice/money in lieu of notice to the other party; and
 - **Neither party** in the service contract **has intended to lead members of the public to believe that an employment relationship exists.**

Employment vs. Independent Contractor

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- Labour Department: 《僱員？判頭/自僱人士？》 Leaflet
 - <https://www.labour.gov.hk/tc/public/pdf/wcp/SelfEmployedPerson.pdf>
- Inland Revenue Department: DIPN No. 25
 - https://www.ird.gov.hk/chi/pdf/c_dipn25.pdf

Independent Contractor – Agency Agreement

- A very special type of contract – governing the relationship between the artist(s) and the artist agent
- Agency relationship – creation of authority to act for and on behalf of the artist(s), for a defined scope and duration
- Agent’s act binding upon the artist(s)
- Issues
 - Calculation of commission and other monetary payments
 - Scope of authority
 - Termination of authority vs. termination of the agency agreement

Employment contract - fundamentals



- Subject to the statutory regulation, employers and employees are free to negotiate and agree on the terms and conditions of employment
- Section 70 of the Employment Ordinance (Cap. 57):
 - “Any term of a contract of employment which **purports to extinguish or reduce any right, benefit or protection** conferred upon the employee by this Ordinance shall be **void**.”
- Statutory Implied Terms

Employment contract - fundamentals



- Essential clauses
 - Wages (including wage rate, overtime rate and any allowance, and whether they are calculated by the piece, job, hour, day, week, month or otherwise)
 - Wage period
 - Length of notice required to terminate the contract
 - Whether the employee is entitled to an end of year payment (e.g. double-pay or bonus), the amount of this payment or the proportion and the payment period



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Must an employment contract be
in writing?

Employment contract - fundamentals



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- Sample Employment Contract 《僱傭合約樣本》
 - <https://www.labour.gov.hk/tc/public/ECsample.pdf>
- 《使用書面僱傭合約》
 - <https://www.labour.gov.hk/tc/public/pdf/wcp/WrittenContract.pdf>

Sharing of income / profits / remuneration



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- Fixed sum vs. Pro-rata sharing
- Installments and conditions for payment
- Agency agreement*

Outside work / restriction on competition



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- Employment? Freelance / independent contractor?
- Rule against double-employment
- Express contractual provision

Restraint of trade / non-competition clause



- Restriction of artist's freedom to be engaged in business / employment
 - In-service
 - Post-service
- Validity - test of reasonableness
 - Temporal scope
 - Geographical scope
- Usual Remedy: Injunction

Allocation of intellectual property rights

- IP rights
 - Copyrights* / Copyright Ordinance (Cap. 528)
 - Registered design
- Authorship (ss11, 12)
- Author = First owner (s13)
 - Employee works in the course of employment (s14)
 - Commissioned works (s15)
- Ownership vs. licence vs. exclusive licence
- Assignment of copyrights (s101)

Allocation of intellectual property rights

- Not strictly IP rights:
 - Duty of confidentiality
 - Duty of non-disclosure
- Funding scheme: requirement about IP rights
 - Warranty: No infringement of IP rights
 - Grant of licence / assignment of ownership / other rights to use



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During the rehearsal of a dance show, AAA Dance's dancer Ms K *volunteers* to choreograph a part ("the Part") of the show. The choreographed Part is subsequently adopted by AD and forms part of the show. Who owns the copyright of the choreographic work of the Part?



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Allocation of risks

- Insurance
- Dealing with failure to perform contractual obligations
 - Contractual / agreed remedies
 - Common law remedies
 - Right to termination:
 - contractual right to terminate vs. acceptance of wrongful repudiation at common law
- Warranty as to state of affairs
 - **Project funding requirements**
- Force majeure clauses
 - Dealing with force majeure events

Allocation of risks

- Force majeure clause
 - **Defining** of certain events as a force majeure event or events **beyond the reasonable control of a party**, including specifying a **non-exhaustive list of examples of events** covered by the clause
 - Provides for a party to **be excused from** performance of its contractual obligations **where such event is triggered**
 - Requiring a defaulting party to **give notice** to the other party in a prescribed form and **within a specific timeframe** when a force majeure event has occurred
 - Provides the **consequences** of the occurrence of a force majeure event, such as suspension for performance of obligations or extension of time for performance of obligations.

AAA Theatre engages an actor Mr Ditch for a drama performance. Mr Ditch has failed to show up in half of the scheduled rehearsals. What should AAA Theatre do?



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AAA Opera engages an overseas artist Ms O to sing the solo soprano in a choral production. During the first rehearsal, it is revealed that Ms O has not applied for a working visa. What should / shouldn't AAA Opera do?

Governing law and dispute resolution

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- Governing law / applicable law
- Jurisdiction clause
 - Litigation vs. arbitration
 - Forum of parties' choice

Special issue: COVID-19

- Engaged artist having contracted COVID-19
- Engaged artist subject to quarantine ordered by a Health Officer
- Compulsory annual leave
- No pay leave
- 《與 2019 冠狀病毒病有關 僱主和僱員在《僱傭條例》下的責任及權利》
 - https://www.labour.gov.hk/tc/news/pdf/EO_related_QAs_on_COVID-19_tc.pdf
- What if artist is a **freelancer**?



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The law on employment of children

Employment of children



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- **All aspects of employment law shall continue to apply**
- Young person: $15 < \text{Age} < 18$
 - Employment of Young Persons (Industry) Regulations (Cap. 57C)
- General prohibition against child labour
 - Definition of child: Age < 15 (Section 2 of EO)
- Subsidiary Legislation: Employment of Children Regulations (Cap. 57B)
 - **Absolute prohibition** of child labour under 13 (Reg 4)
 - Children > 13 having completed Form 3 (Reg 5)
 - Children > 13 having not completed Form 3 (Reg 6)
- Exception by way of administrative decision by Commissioner for Labour (Section 73):
 - Child Entertainers (兒童藝員)

Employment of children

13 < Age < 15



- Parent's consent in writing to the employment
- Children: 13 < Age < 15 + completed form 3 shall NOT be employed:
 - before 7 am or after 7 pm
 - for more than 8 hours on any day
 - to work continuously for more than 5 hours without a break of not less than 1 hour for a meal or rest
 - to carry any load exceeding 18 kg

Employment of children 13 < Age < 15



- Additional conditions for children: 13 < Age < 15 + **NOT YET completed form 3** → shall not be employed to:
 - during school hours on any school day
 - during the school term for more than
 - 2 hours on any school day or
 - 4 hours on any other day
 - during the summer holidays for more than 8 hours on any day
 - in certain occupations or premises (see Schedule to Cap. 57B)

Prohibited occupations for children: 13 < Age < 15 + NOT YET completed form 3



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- 1. In any premises or place where **intoxicating liquor** is sold and consumed.
- 2. Without prejudice to section 15 of the Public Cleansing and Prevention of Nuisances Regulation (Cap. 132 sub. leg. BK), in the handling for gain or profit of **any refuse in any public place**.
- 3. In the handling or delivery of any **dangerous goods** to which section 3 of the Dangerous Goods Ordinance (Cap. 295) applies.
- 4. At **any machine** which, by reason of its **cutting, grinding, rolling, pressing, crushing or similar action, is dangerous**.
- 5. In any of the following premises or places, that is to say—
 - (a) any **dance hall, billiard saloon, mahjong, tin kau or gambling establishment**; or
 - (b) any premises or places at which any **fixed odds betting or pari-mutuel betting, cash sweep or lottery** is organized or conducted.

Prohibited occupations for children: 13 < Age < 15 + NOT YET completed form 3



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- 6. In **any place of public entertainment** except in with a stage performance the net profits (if any) of which are devoted to purposes other than the private gain or profit of the promoters of the performance.
- 7. In the **kitchen** of any hotel boarding house, cooked food shop, cafe, restaurant or any establishment of a similar kind.
- 8. In **outside window-cleaning** at more than 3 m above ground level.
- 9. In any **abattoir or slaughter house**, within the **curtilage** of any abattoir or slaughter house or in any premises used in therewith.
- 10. In any **hair-dressing saloon** or **massage parlour**.

Child Entertainers

- Requirement: Application to Commissioner for Labour before employment commences
- 2 categories
 - Extras (臨時演員) - ad hoc employment in a particular programme or production
 - Contract artistes/freelancers (合約演員/自由演員) - employment on a contract covering a certain period of time or on programme basis.

Child Entertainers – Formal application for permission



- Extras (臨時演員)
 - The application (Form CEF-1) should reach the Labour Department **at least 48 hours before** commencement of the employment. **A script or storyboard** of the production should also be submitted.
- Contract artistes/freelancers (合約演員/自由演員)
 - The application (Forms CEF-1 and CEF-2), together with **a script or storyboard of the production**, should reach the Labour Department **at least 7 days before** commencement of the employment. Besides, copies of **each child employee's employment record** (Form CEF-4), **his parent's written consent** to the employment (Form CEF-5), as well as **a valid school attendance certificate** (i.e. a document issued by the school head, certifying that the child employee is attending at the school) or evidence of completion of Form III in respect of the child, should be submitted at the same time.

Child Entertainers – Standard conditions



- No child shall be employed:
 - before 7 a.m. or after 11 p.m.
 - for a period of employment more than 8 hours on any day
 - for working more than 4 hours on school day during the school term
 - during school hours
 - for more than 4 days in a week and during school term for more than 3 days from Monday to Saturday
 - during the 12 hours immediately following the ending of his work on any day
 - to work continuously for more than 5 hours without a break of not less than 1 hour for a meal or rest and, in the case of a child under the age of 6, without an additional rest period of not less than half an hour within the said spell of 5 hours
- **Free transport** should be provided to take each child employee home if he is required to work **after 7 p.m.**
- No child shall be engaged in any act that is **dangerous to his life, health or morals**

Child Entertainers – Standard conditions



- Additional conditions for contract artistes/freelancers:
 - an **employment record** in respect of each and every child entertainer containing his personal particulars and information about the employment
 - a **written consent** to the employment **from the child's parent**
 - a **valid school attendance certificate** or evidence of completion of Form III in respect of the child.

Child Entertainers - Children participating in cultural performance



- Summary application procedure for organising institutions intending to arrange children to participate in **cultural performances**
- Notify Labour Department 14 days before the commencement of the performance in a standard notification form (Form CEF-6)
- Pre-requisite:-
 - (a) the children and/or their parents/guardians **do not receive any pecuniary reward**, in whatever terms or titles (e.g. meal/clothing/traveling allowances, but excluding lunch box, costumes or transport free of charge by the organizing institution), **for taking part in the performance**; and
 - (b) the **safety, health and welfare**, as well as the **schooling and morals** of the children are **not jeopardized** in the course of the activities, e.g. the frequency of performances does not exceed 7 days per month or 4 days per week.

Child Entertainers - Children participating in cultural performance



- If the Labour Department is satisfied that the criteria outlined above are fully met, the organising institution will be **informed in writing that formal application for the Commissioner for Labour's permission is not required.**
- To protect the welfare of child performers, the organising institution should take out **accident or other relevant insurance** so that the children are protected in case of accident during performance.
- If, after scrutinising the notification, the Labour Department considers that a formal application for the Commissioner for Labour's approval is required, **the organising institution will also be informed in writing that formal application should be submitted.** Such application should be accompanied by the required documents, including written consent from the child's parent/guardian and valid school attendance certificate.

Employment of children

- Employment of Children Regulations (Cap. 57B) 《僱用兒童規例》
- 《僱用兒童規例簡明指南》
 - <https://www.labour.gov.hk/tc/public/pdf/lid/ChildrenRegulations.pdf>
- 《僱用兒童藝員指南》
 - <https://www.labour.gov.hk/tc/public/pdf/lid/GuideEmploymentChildEntertainers.pdf>



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Thank you 😊
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