

M. LIMITATION OF LIABILITY BY CONTRACT

1. Although it is not acceptable for a solicitor to attempt to exclude all liability to his clients, there is no objection as a matter of professional conduct to a solicitor seeking to limit his liability in business other than contentious business to his clients provided that the following conditions are fulfilled:
 - (a) he has in full force and effect valid professional indemnity cover in accordance with the requirements of the Solicitors (Professional Indemnity) Rules;
 - (b) the limitation of liability is not below the minimum level of cover required by the Solicitors (Professional Indemnity) Rules.
2. The limitation of liability is subject to the position in law and the general fiduciary obligations of solicitors to their clients. Relevant provisions include the following:
 - (a) Under section 59(2) of the Legal Practitioners Ordinance, a provision purporting to exclude a solicitor's liability for negligence in an agreement for fees in contentious business will be void.
 - (b) The Control of Exemption Clauses Ordinance
 - (i) prohibits, under section 7, exclusion or restriction of liability for death or personal injury resulting from negligence and requires exclusion or restriction of liability for other loss or damage resulting from negligence to satisfy the requirement of reasonableness;
 - (ii) states, under section 3(1), that the requirement of reasonableness is satisfied only if the court or arbitrator determines that the contract term was a fair and reasonable one to be 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;
 - (iii) provides, under section 3(5), that in considering whether a contract term restricting liability to a specified sum of money satisfies the requirement of reasonableness, the court or arbitrator shall have regard in particular to the resources which he could expect to be available to him for the purpose of meeting the liability should it arise and how far it was open to him to cover himself by insurance;
3. Contractual terms are only binding if they are incorporated into a contract. Incorporation of a term into the contract is presumed if the parties have signed a written contract containing that term. However, a person wishing to rely on a particular term against a party that had not signed the contract would need to show that the term had been brought fairly and reasonably to the attention of the non-signing party. The more unusual the contract term the more effort needs to be made to bring it to the other party's attention. Accordingly, if a limitation of liability provision is contained in a solicitor's engagement letter, and the letter is not countersigned by the client, this provision will not bind the client unless the solicitor can show that the provision had been brought, fairly and reasonably, to the attention of the client and accepted by him.
4. Liability for fraud or dishonesty cannot be limited.
5. The contract of limitation may be affected by foreign law where the act or omission covered by the contract of limitation occurs outside Hong Kong or the governing law is not Hong Kong law.
6. This Practice Direction came into effect on 6 June 2005.
7. This Practice Direction is regarded as advisory.