

**For information
on 4 June 2013**

**Bills Committee on
Trust Law (Amendment) Bill 2013**

**Supplementary Information arising from
the Meeting on 27 May 2013**

PURPOSE

In response to Members' request at the fifth meeting of the Committee on 27 May 2013, this paper provides information on the legal position pertaining to the statutory rules governing exemption clauses in contracts and their applicability to trust deeds.

**STATUTORY RULES GOVERNING EXEMPTION CLAUSES IN
CONTRACTS**

2. The statutory rules that regulate exemption clauses in contracts can be found in the Control of Exemption Clauses Ordinance (Cap 71) ("CECO"). It seeks to, *inter alia*, limit the extent to which civil liability, mainly for breach of contract and negligence or other breach of common law duty, can be avoided by means of contract terms. The legislation prevents a person from excluding or restricting his liability for contractual obligations and common law duties by reference to any contract term, unless the term satisfies the requirement of "reasonableness".

3. CECO is modelled on the Unfair Contract Terms Act 1977 ("UCTA 1977") of the United Kingdom ("UK").

INAPPLICABILITY OF THE RULES TO TRUST DEEDS

4. The statutory rules under the CECO are not applicable to trust deeds. It is because it has been unequivocally established in case law

that trust deeds are not contracts¹ and a contract and a trust are mutually exclusive concepts². The United Kingdom Law Reform Commission (“UKLRC”) also considered that the nature of obligations arising from trust deeds and contracts are distinct³.

5. The UKLRC has considered in detail and concluded in its report published in 2006⁴ that it was inappropriate to adopt the test of “reasonableness” in the context of trustees’ exemption clauses in trust deeds. The test may give rise to considerable uncertainty and litigation, as unlike the case of contracts, there is no guiding body of case law for trust deeds.

ADVICE SOUGHT

6. Members are invited to note the content of this paper.

Financial Services and the Treasury Bureau
31 May 2013

¹ *Baker v J.E. Clark & Co (Transport) UK Ltd* [2006] EWCA Civ 464

² *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th edition) (2007) (LexisNexis Butterworths: Great Britain), para 1.23; *Thomas, G and Hudson, A, “The Law of Trusts”* (2nd edition) (2010) (OUP:US), at para 1.64

³ Trustee Exemption Clauses, UK Law Commission (Law Com No 301), para 2.26.

⁴ Trustee Exemption Clauses, UK Law Commission (Law Com No 301).