OLIVIA WHITCROFT

"We're often asked to sign up to crazy liability terms in the tech world"

An invitation to a child's birthday party makes Olivia consider being a party-pooper over the liability terms she has to sign

My daughter is excited to go to a birthday party this month, being held at an activity centre. All parents have been sent a link to a waiver that we need to sign for our children to participate. Parents are responding one by one: "Signed it." I am just opening it up.

First line: "I accept that there is... danger and risk of physical or emotional injury, paralysis, death, or damage to participants."

Just what every mother wants to hear.

Next paragraph: "Activities are undertaken at the participant's own risk and I will not hold the venue liable for any injury the participant may suffer."

Tough luck for us if any of their equipment is faulty.

There's more: "I will indemnify the venue against any claim... for loss, damage, injury or death which has been caused by any action or omission of any participant."

To summarise: it's all on us if something goes wrong.

I can't think of anything I want to sign less. But am I going to be the parent who doesn't let their child attend a friend's party because she refuses to sign the waiver? Or the lawyer who delays anyone being able to take part while I'm demanding to speak to the person who drafted it to discuss amendments?

As with other similar venues, we are presented with something that is scary to read, lengthy and hard to understand, and unlikely to be fully read by many. And yet everyone signs them in a hurry so that the fun can commence.

Couldn't these things be a bit more parent-friendly? Personal injury is not one of my legal specialisms, but how about:

Olivia is principal of the law firm OBEP, which specialises in technology contracts, IP and data protection
@ObepOlivia

"Am I going to be the parent who doesn't let their child attend a party because she refuses to sign the waiver?"

- The venue will ensure the facilities are safe and age-appropriate.
- We will check our child is fit enough to take part and doesn't act like an idiot.

Crazy tech terms

We're often asked to sign up to crazy liability terms in the tech world, too. Here are some I've seen recently.

a) Services agreement: "The Customer will not make any claim against the Supplier... unless the loss or damage arises from gross negligence or wilful misconduct." So it's tough luck if the supplier is only slightly negligent and causes my system to explode?

b) Software collaboration agreement: "The Information is provided... without any warranty... as to its accuracy or completeness, use or fitness for a particular purpose." It's not a great foundation for the relationship if the supplier provides fictitious information about its software.

c) Agreement for data processing services: "In no event shall the Provider be liable for... loss of or damage to data..." That gives me a lot of confidence in uploading all my confidential data to your systems.

Couldn't these things be a bit more customer-friendly?

A customer may not be willing to appoint a supplier who doesn't accept any responsibility when things go wrong. Yet some of these provisions do make it through to signature. In some cases, the customer has undertaken a proper assessment and acceptance of the risk. But in others the terms aren't read or understood, or they're presented as standard and non-negotiable.

Enforceability

I've been giving the impression that if the terms are crazy, you would be crazy to sign up to them. But the law does give some protection against liability limitations that go too far, even if you do agree to them.

It isn't possible to exclude or restrict some types of liability (in a contract or notice). This includes (for most contracts) liability for death or personal injury caused by negligence, and exclusion of certain implied warranties in B2C contracts (for example, relating to the quality of goods, or skill in performing services).

Terms seeking to exclude or limit other types of liability (in B2C or B2B contracts) may also be subject to a "fairness" or "reasonableness" test to determine whether they are effective. Various factors can impact this, such as what losses may be anticipated, the bargaining power of the parties, the availability of insurance, any inducement to agree, and whether the restriction is usual and understood. It's a complex topic that is much discussed by the courts, making liability provisions some of the trickiest to draft and advise on.

Leading on from this, if you're presented with a contract including a term that you think is unfair, should you sign it anyway, knowing that if there were a dispute, you can argue that it's ineffective? If you're in a weak bargaining position, and under pressure to sign, this may help. It was going through my head when I was presented with the waiver. But if you can negotiate, non-existence of the term may be preferable to arguing its unenforceability.

As the supplier, sneaking through unreasonable liability limitations could act as a deterrent to your customer bringing legal action. But if they are ever tested, they may fall down.

BELOW A waiver for a birthday party at an activity centre wasn't very parent-friendly

And if limitations on your liability go away, that means your liability is unlimited, which could be a lot worse than if the terms had been fairer.

Back to the crazy terms

Are the terms I shared above likely to be binding?

Term (a) is unlikely to be fair in a B2C contract, and wouldn't be effective in excluding liability for breach of statutory warranties. It also gives me concern in a B2B scenario, unless the supplier can demonstrate it was negotiated (or negotiable) and the risk was accepted (perhaps as a trade-off for price or other matters).

Under term (b), the supplier doesn't promise that data it shares is accurate or suitable for the collaboration (B2B). We need the wider context to assess whether its effect could restrict liability for what is expected. In itself, it isn't obviously unenforceable, but if the other party is relying on good-quality information, it may not want to enter into the relationship.

Excluding liability for loss of data in term (c) may be a problem, though it depends on the meaning of "loss". If the intended service isn't for data storage or backup, it could be reasonable to expect the customer to maintain its own copies and not rely on the provider retaining records. But it may be less reasonable to exclude liability for a data breach that leaks confidential or personal information. I think clearer drafting is needed.

Liability caps

Another way to limit liability is to set a maximum amount that a party would pay in the event of a breach. But if the cap is too low, it risks unenforceability, as discussed above.

Insurance cover can impact the choice of cap. I was advising a client undertaking software development on a liability cap for its standard terms. It looked at its insurance policy, which had a limit of £1 million for claims under it. So it proposed to put a cap of £500,000 per claim in its terms. This would ensure that any claim was covered by its insurance policy, right?

We dug a bit deeper and discovered a few problems. First, the limit in their insurance policy was £1 million "in the aggregate"; in other words, for all claims. If my client had 20 customers, who each made a claim for £500k, my client could be liable to pay £10 million. And its policy would only cover £1 million of that.

Second, the insurance limit was £1 million for the year covered by the policy. But my client was suggesting a £500k cap per claim under its terms. If each of the 20 customers made, say, three claims of £500k in the year, my client could then be liable to pay £30 million. And its policy would only cover £1m of that.

Third, not all potential claims were covered by the policy. It's common for professional indemnity policies to exclude certain types of loss, such as cyber incidents and personal injury (as they can then sell you separate cyber liability and public liability insurance policies). In my client's case, it was even worse than that: its policy covered services provided by another arm of its business, and did not obviously cover claims relating to software development.

So its policy would, in fact, not cover any of the £30 million claimed by its customers. Needless to say, I advised my client to re-think both the cap and the insurance cover.

Another common approach is to relate a cap to fees paid, such as (with a made-up example) 250% of fees paid in a year per claim. Often, I see terms capping total liability at the same amount as fees paid. On the face of it, it sounds fair – you paid me £200 for my services, so I'm not going to pay more than £200 back to you if something goes wrong.

But is that actually reasonable? Let's draw a parallel with my personal injury example. If I pay £20 for a ticket at the activity centre, and then suffer an injury due to faulty equipment, is it fair to limit my compensation to the £20 I paid? (Before you say it: a term restricting liability for injury arising from negligence is also ineffective.)

In some cases it *could* be fair to set a cap at fees paid; if I don't provide what you've paid for, I'll give you your money back. But the consequences of non-performance need to be thought through to determine this.

ABOVE The law gives protection against liability limitations that go too far

"An indemnity can be a powerful remedy under a contract"

BELOW Good liability provisions should be negotiated in advance

Watch out for indemnities

An indemnity can be a powerful remedy under a contract, requiring one party to compensate the other for costs arising from particular issues (such as intellectual property infringements or breaches of specific terms). But it's not always clear whether liability limitations and caps placed elsewhere in the contract apply to such indemnities.

As a customer, you may be delighted to read that the supplier will indemnify you should its software infringe someone else's rights. But you may be less happy to discover that such indemnity is subject to the £100 liability cap that it snuck in. On the other hand, the supplier may find the indemnity falls outside the cap and other provisions limiting liability.

So how about just being blunt about it: "The liability limitations under clause 5 [do][do not] apply to the indemnity under this clause 7."

Bad and good provisions

Random, tricksy, irrational or confusing provisions limiting liability do not cast a good impression and may face problems should anyone need to rely on them.

My tips for drafting a good liability provision: think through what issues may arise, and what losses either party may suffer. Determine (or negotiate) how much risk and liability it is fair for each party to take on. Then draft and present the provision clearly so that both parties know what they are agreeing to.

Postscript: in case you were wondering, my daughter survived the party unscathed.

olivia.whitcroft@obep.uk