Guest columnist

OLIVIA WHITCROFT

"If you understand what you are up against, you can conduct more informed negotiations"

Lawyer Olivia Whitcroft has spent years helping businesses create contracts. Here, she gives a blow-by-blow account of how to do it right

"Does anyone have some template Ts and Cs?" This is a question I often see in (oxymoronic) business social media forums. If furnished with one or more sets of terms by kind fellow members, the amateur contract-drafter can then create a sparkling new contract using one of the following techniques:

1. Using the document as is. One shouldn't fiddle with the wording, and it worked for @EsméBiz, so it will work for me too. This often results in terms for the manufacture of goods vehicles being used for the provision of a software service.
2. Combining several sets of terms into a new contract. If you have five clauses dealing with each issue, that gives you five times the protection, right? This creates a lovely long-form agreement, with so many competing terms to make one's head hurt. The judge is bound to enjoy working through it should it ever go to court.
3. Picking out the bits and pieces that sound good from different sets of terms, and rapidly mixing them up into a new, tailor-made contract. The result is a mesh of clauses that don't quite work together as a team.

This isn't to say the "here's one I prepared earlier" approach has no merit. I don't re-invent the wheel every time I draft a new contract. I use previous contracts for ideas of the types of issues to cover and the way to phrase particular clauses, and sometimes a precedent as a whole will be a good fit to start off a new agreement. But not everything can be copied across from somewhere else without thought. You need to mean every word you say in the context of a specific relationship.

So, what approach can you take to prepare a new contract?

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

"You need to mean every word you say in the context of a specific relationship"

Say what you want

The terms of a contract are meant to reflect how the parties want to do business or set up their relationship. Then if one party doesn't do what was intended, the other can say, "this is what we agreed you should be doing".

The first thing to do is write down what you need from the relationship. For a customer: you want to receive particular products or services, you want them delivered in a specific timeframe, and you're willing to pay a particular amount. For a supplier: you will provide particular products or services, aim to deliver them in a specific timeframe, and require payments on specified dates.

What haven't you said?

I was helping a business recently that had entered into a development agreement. The parties had included their key terms for the project, which was helpful. Unfortunately, there were gaps in what was expected of each party, and the terms were silent on how and when they could end the relationship. This meant that now the parties did not see eye to eye on the project, my client wasn't sure how to terminate or the consequences of doing so; including who would have rights to use the developments to date.

So, once you have documented your key points, think more about what you haven't said. This includes any assumptions that aren't spelt out. For example, you may know what your services are, but is it clear in the contract? Otherwise your customers may be surprised if they get something different to what they were expecting, leading to disputes over payment and negative feedback. A clear service description and details of service standards should assist with this.

Think about how long you are committed to providing or receiving services for. Take into account things that could go wrong. For example, as a supplier, what happens if you aren't paid on time – can you suspend the services and charge interest? As a customer, what happens if you don't receive what you are paying for – can you terminate the contract and will your fees be refunded? What will happen to the output of work carried out so far?

When you're setting up a shiny new relationship and are on great terms with the other party, it may be difficult to think about things going wrong and the process for ending the relationship. But it can save future difficulties if these eventualities are addressed.

Is it clear what terms mean?

Now read everything you've written down twice. Is it crystal clear what it all means, or could the other party be interpreting it differently?

Consider the sentence you've just read: "Now read everything you've written down twice." Am I instructing you to re-read everything you've written down? Or to read only the things you've duplicated? I intended the former, but you may validly interpret it as meaning the latter.

RIGHT When preparing a contract, don't gloss over legal-sounding terms

Is it too one-sided?

It can be tempting to draft all the terms in your favour. Pile the responsibilities on the other party, and don't include anything that would put you to any trouble. It may feel like this will put you in the best legal position. But it may not be the best approach, either commercially or legally.

First, how will these one-sided terms come across? Will the other party want to do business with someone who doesn't commit to anything and yet requires the earth from them? Presenting these terms may also substantially increase the time and costs needed to negotiate and amend them to be acceptable to both parties.

And this problem is unlikely to be solved by hiding unfavourable provisions deep within standard terms so they aren't spotted. Unusual or onerous terms may need to be brought to the other party's attention to effectively incorporate them into the contract. Provisions can also be unenforceable if they are too far in your favour, particularly if you are a business selling to consumers or offering no negotiation on your terms.

Remember a contract is meant to reflect how the parties intend their relationship to work, rather than being a way to trick the other party into agreeing something they don't want. So you may wish to prepare terms that are fair to start with.

Add a little boilerplate?

You're already getting quite far along with your contract. But you may look at other contracts and say, "hang on, there's some legal-sounding stuff in there that I don't want to miss – limitations of liability, indemnities, governing law, material breach. I don't really understand it all, but should I just copy these bits?"

As with all the other terms, however, it's important to understand the effect of these provisions before including them. Terms on breaches and liability are some of the most important to get right. Yet they are often treated as "boilerplate" and copied across from other agreements.

Imagine you're appointing a new supplier, and have spent days negotiating fees, service standards and delivery timescales. You have little energy left for nit-picking about boilerplate terms. The limitation of liability provisions prepared by your supplier look standard, with various exclusions for losses of profit, business, data and goodwill, and liability capped at service fees paid in the previous six months.

But if the system provided by the supplier is business-critical to you and it goes down, you may suffer significant losses of profit and business. If the system is your main repository for client data, you're likely to have substantial data loss. And for any losses you can recover, they are subject to the cap. This may not be a sufficient remedy if your losses have the potential to exceed fees paid, or if the payment structure means that limited (or potentially no) fees have been paid in the previous six months. These liability provisions may therefore undermine the value of the contract.

You may not be in a position to ask suppliers to remove all liability limitations, but if you understand what you are up against, you can conduct more informed negotiations.

Other legal stuff

For some types of contract, there are terms implied in them (such as warranties on quality of products) or that are required to be included (such as data protection clauses). Special wording may be needed to achieve things legally (such as assigning intellectual property). There are also legal rights that you can't change by writing something different (such as a consumer's right to cancel a contract made at a distance) and, as touched on earlier, terms can be unenforceable if they aren't fair. The process for agreeing the contract can also have its nuances. And there may be additional legal issues specific to your relationship.

To add to this, contract law is constantly evolving. The English courts are involved not just in applying existing rules, but in developing the rules, too. And boy are there a lot of contract disputes! The judges undertake tricky analysis where the intention of the parties is unclear from the written agreement, which may have been avoided with better drafting.

So, there is a use for us lawyers, and it's a good idea to have legal input into your contract if you can. Though if you aren't treating the contract as a mere legal formality, and have thought through your key points and those that need additional assessment, this could reduce the complexity (and cost) of the advice you need.

ABOVE Contracts are often added to over years and can become unwieldy

"Provisions can be unenforceable if they are too far in your favour"

BELOW Good legal advice can save you a lot of time and wasted effort

Don't be afraid to start again

I was recently asked by a small business to review its standard terms of service. It had been building on them over a number of years. This can be a useful approach – starting with key terms so you have something in place, then adding to them as new issues arise.

However, the business had kept adding more and more, and by the time I looked at the terms, they had evolved into something with varying drafting styles, multiple overlaps and a muddled structure.

We discussed preparing a new set of terms without these problems, and reflecting the business as it was today. My client was worried this would take longer and would mean losing some of the protective clauses she had built in. But actually, trying to rationalise and update older terms can be harder (and less effective) than starting again. The same issues could be addressed with potentially clearer and more consistent new wording. In the end, my client was relieved to get rid of old complex terms and have a refresh.

The moral of the story

Contracts are not there just to sound legal and impressive, but should set out what the parties actually want to get from the relationship. Looking at terms prepared earlier can be helpful, but don't be afraid to be different. Make sure you include everything that is important to you, and that you mean every word you say.

olivia.whitcroft@obep.uk