

## Is that indemnity form valid?<sup>1</sup>

1. During the school holidays, it is common for students to sign up for extra-curricular activities and it is equally common to be asked to sign an indemnity form. In a typical indemnity form, you agree to waive your right of legal action in the event of personal injury or death, arising from the negligence of the operator, while engaging in a specified activity. You might also agree not to hold the operator liable for any injury or death arising from your own negligence, as well as for loss of or damage to your belongings. It may look something like this:

*I \_\_\_\_\_ hereby release, waive and discharge the Company and its Agent(s) from, and covenant not to sue for, any and all liability, claims, demands, actions and causes of action whatsoever arising out of or in relation to any loss, damage or injury including death, that may be sustained by me or to any property owned by me, howsoever caused.*

2. However, such clauses most often do not protect the operator against liability in the event of personal injury or death due to the operator's negligence. This is largely due to the Unfair Contract Terms Act ("UCTA"). Section 2(1) expressly prohibits the exclusion or restriction of liability for death or personal injury resulting from negligence.<sup>2</sup> Section 2(2) further requires a contractual term to be "reasonable" before liability for negligence can be excluded or restricted.<sup>3</sup> This test simply determines, based on the circumstances, whether it is reasonable to allow the exclusion term or notice to be effective. Some factors include:<sup>4</sup>
  - a. The relative bargaining powers of the parties – if one party was in a much stronger bargaining position, he might have a weaker case;
  - b. Whether reasonable alternatives were available to the aggrieved party, or if that party was induced to enter the contract;
  - c. Whether the aggrieved party knew or ought reasonably to have known of the existence of the exclusion term; and

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<sup>2</sup> Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) s 2(1).

<sup>3</sup> *Id.*, s 2(2).

<sup>4</sup> *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [38].

- d. Whether it was reasonable or practicable at contract formation to expect compliance with the clause.
3. If the test is not satisfied, the exclusion term is ineffective and liability for negligence may arise.
4. What about loss or damage to your belongings? That also depends on the circumstances. If it is due to the operator's own negligence, the operator may not be able to rely on the indemnity form to exclude or restrict liability for the failure to safeguard your belongings. This is because it can be argued that it would be contrary to public policy to allow an operator to rely on an exclusion term to exclude or restrict liability for its own negligence. However, if it can be shown that the contract term to exclude or restrict liability was reasonable based on the circumstances, then you might not have a case after all. For example, if an operator has a bag deposit service subject to a \$2 fee and it has given notice that its maximum liability is \$50 for lost items (which is arguably reasonable considering that it only costs \$2 to deposit your bag), it would be immensely difficult for you to seek redress for the loss of a \$5,000 handbag.
5. In conclusion, indemnity forms do not always operate to exclude liability for personal injury or death arising out of the operator's negligence. It depends on the exact circumstances involved. Nonetheless, you should bear in mind that seeking redress, whether through legal proceedings or otherwise, may be expensive and time consuming. It would be better to simply take more precaution and exercise due care when engaging in activities requiring indemnity forms.