

The background of the slide is a teal-colored illustration of a prehistoric landscape. It features silhouettes of various dinosaurs, including a long-necked sauropod, a triceratops, and a T-Rex, as well as palm trees and a large, cracked, yellowish-orange rock formation in the center. The text is centered on this rock formation.

Practical Advice on Reviewing Commercial Contracts

September 12, 2024

**Presented For:
ACC South Florida**



Presented By:



Fradyn Suarez
Partner
King & Spalding



Seth Finck
Sr. Counsel
IT & Privacy
Restaurant Brands
International



Teresa de Torres
Managing Counsel
Commercial Millicom
International Cellular
S.A.



Dirk Lasater
Senior Associate
King & Spalding

Agenda

- Intellectual Property
 1. Drafting Language
 2. Staying Out of Court
- Limitation of Liability
 1. Limit on Liability Type
 2. Liability Caps & Exclusions
- Indemnification
 1. Limitation of Liability vs. Indemnification
 2. Scope of Indemnity
- Data Privacy; Privacy and Security Incident Response
- Artificial Intelligence
- Navigating Business Tensions



An aerial photograph of a dense forest with a pterosaur flying in the sky. The pterosaur is silhouetted against the sky, with its wings spread wide. The forest below is a mix of green and brown, suggesting a natural, somewhat rugged landscape. The overall tone is muted and naturalistic.

Disclaimer:

The views expressed during this program do not constitute legal advice, belong solely to the panelists, and do not reflect the views of the Association of Corporate Counsel or the entities for whom the panelists are employed.

Intellectual Property – Drafting Language



Intellectual Property – Staying Out of Court

- Avoid Ownership Disputes
 - Development or License
 - Works Made for Hire
 - Joint Ownership
- Non-Infringement Warranties v. Indemnities



Risk-Sharing; Risk-Shifting

- Limitation of liability – Key clause between Vendor and Customer
 - Carveouts
 - Secondary/Super Caps
- Indemnification
 - Third-party claims
 - Consider limitation of liability (carveouts and exclusions)



Limitation of Liability – Limit on Liability Type

Typical: Limited to direct damages only; often (made) mutual.

e.g., *“In no event will either party be liable under this agreement under any legal or equitable theory, including breach of contract, tort (including negligence), strict liability, and otherwise, for any consequential, incidental, indirect, exemplary, special, enhanced, or punitive damages whether arising out of breach of contract, tort (including negligence), or otherwise...”*

Generally, direct damages limitations are non-controversial ...

- **But see Data Breach:** Notices to affected consumers, credit monitoring, and many other data breach damages are consequential.



Limitation of Liability - Liability Caps & Exclusions

- Market Standard Caps
- Exclusions

Standard exclusions from

i. Bodily injury or physical damage to tangible property

ii. Gross negligence

iii. Damage and loss caused by confidentiality obligations

iv. Infringement of intellectual property rights (for discussion re: indemnity) or

v. Indemnity obligations/cyber breaches

Indemnification - Scope of Indemnity



Coverage of Claims

- Defend, Indemnify and Hold Harmless
- Direct v. Third-party Claims
- Types of damages (direct, consequential, punitive and/or attorneys' fees)
- Scope of Coverage (e.g., IP infringement, breach of contract, violation of law)

Carve-Outs and Carve-Ins

Data Security; Privacy and Security Incident Response

- Customer due diligence required to understand:
 - Type, sensitivity and volume of data collected by the Vendor
 - Border crossing
- Vendor security incident response requirements
- Regulatory Requirements
- Shared risk and Responsibility
- Cyber Insurance
- Suspension & Termination Rights as Recourse (SaaS)



Artificial Intelligence

- Risks and Benefits
- Due Diligence
 - Know Your Vendor
- Keep an Eye Out: Vendor Risk Management and Governance
- Compliance / Regulatory Landscape
 - White House AI Bill of Rights
 - Industry Accords / NIST
- Technology Framework
 - Training Data; Dedicated Instance; Customization; Safeguards



Navigating Business Tensions

- Interests in Common
 - Success and expansion of business
- Interests at Odds
 - Mindset for risk / risk mitigation
- Risk Tolerance v. Value
 - Risk can be disproportionate to the value of a commercial transaction



Questions?



Fradyn Suarez
Partner
King & Spalding



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Highlighting Trends



Change Photo to illustrate your point of information.



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