DEMYSTIFYING INDEMNITY AND LIMITATION OF LIABILITY (LOL):
ITS NO LAUGHING MATTER

Presented by
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About Leslie Marell

- Practicing attorney with more than 30 years experience in commercial transactions
  - Represent Buyers and Sellers in diverse business transactions

- Present seminars on contracting & legal issues relating to purchasing and sales

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PURPOSE OF THIS PRESENTATION

DEMYSTIFY:
INDEMNITY & LIMITATIONS OF LIABILITY

DISCUSS THEIR RELATIONSHIP

CONSIDER APPROACHES TO RESOLUTION

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CONTRACT OBJECTIVES

WE NEGOTIATE CONTRACTS TO:

- DEFINE THE DEAL
- IDENTIFY/ MANAGE RISKS

TWO CLAUSES RELATING TO MANAGING RISKS:

- LIMITATION OF LIABILITIES
  - INDEMNITY
TOPICS

- **Limitations of Liability:**
  - Summary of Contract Damages
  - What’s at stake

- **Indemnity:**
  - Plain English explanation
  - Third Party Indemnity and Contractual/ First Party Indemnity

- **Typical Supplier Problems with Buyer clauses**

- **Insurance**

- **Relationship between LOL & Indemnity**

- **Approaches to Negotiation & Resolution**

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DAMAGES

IF A SUPPLIER BREACHES THE CONTRACT, WE ASK THE QUESTION:

What is the Supplier’s liability to the Buyer for damages?

DAMAGES = $$
THREE MAJOR TYPES OF CONTRACT DAMAGES

1. **Compensatory Damages** (Direct, Actual, General)
   Damages which flow **directly** from the breach.
   These damages must be **foreseeable** to a stranger to the transaction.

2. **Incidental Damages**
   *Expenses* incurred by the injured party as a result of the breach.

3. **Consequential Damages** (Special, Indirect)
   Damages which flow directly from breach, but may not be obvious to one party in advance without communication of the other’s **special circumstances**.
   At time of contracting, breaching party had specific reason to believe these special damages would be **reasonably foreseeable** and occur.
REMEDY AT LAW

REMEDY: A RIGHT

REMEDY AT LAW = Automatic right

If Seller breaches and Buyer incurs damages:

Buyer’s REMEDY AT LAW is to
Recover CONTRACT $$ from Seller

AND

Seller is automatically **liable** to Buyer for
ALL CONTRACT $$$

UNLESS...
LIMITATION OF LIABILITIES

....the parties have agreed to a
LIMITATION OF THE SELLER’S LIABILITIES

In no event shall Seller be liable to Buyer for any
incidental or consequential damages. Seller’s
maximum liability under this Contract shall be limited to
the purchase price of the Product/ Service/ Equipment, etc.
IMPORTANCE OF LIMITATION OF LIABILITY TO THE SELLER

WITHOUT LOL:
Seller will be financially responsible to Buyer for ALL CONTRACT damages if Seller breaches.

These damages can greatly exceed the contract price.

WITH LOL:
Seller has capped $$ responsibility if it breaches.
LOL IMPACTS MANY CONTRACT ISSUES AND CLAUSES

WARRANTY

DELIVERY

SELLER’S PERFORMANCE OBLIGATIONS

Quality;
Repair/ Replacement;
Acceptance Procedures
Packaging;
Deliverables;
Milestones;
Metrics;
Meeting applicable statutes & regs
All obligations Seller has under the contract
TWO MAJOR ISSUES IN LOL

In no event shall Seller be liable to Buyer for any
*incidental* or *consequential* damages.

Seller’s *maximum liability* under this Contract shall
be *limited to the purchase price* of the Product.

1. **First** sentence limits Seller’s liability by excluding
INCIDENTAL and CONSEQUENTIAL damages;

2. **Second** sentence addresses DIRECT damages and
limits to the price of the product/service/equipment.
LOLs are EVERYWHERE:

FROM DELL’S WEBSITE:

A. Dell will not be liable for any incidental, indirect, special or consequential damages arising out of or in connection with this Agreement or the Products or Services. Neither party shall have liability for the following: (i) Loss of revenue, income, profit or savings; (ii) Lost or corrupted data or software, loss of use of a system or network; (iii) Loss of business opportunity; (iv) Business interruption or downtime; or (v) The Products not being available for use...

B. Dells’ total liability for an and all claims arising out of or in connection with this Agreement in any 12 month period shall not exceed the total amount received by Dell during the prior 12 months of this Agreement for the specific product or service giving rise to such claim(s)....
LIMITATION OF LIABILITIES

IMPORTANT TO NOTE:

Unless both parties have signed a contract containing a Limitation of Liabilities clause,

The Seller will NOT have limited its liabilities.
INTRODUCING LAWYERS INTO THE MIX

WHAT WILL BUYER’S LAWYER BE CONCERNED WITH?

- ENSURING BUYER **WILL BE REIMBURSED** THE FULL AMOUNT OF ITS DAMAGES, LOSSES AND EXPENSES IF ANYTHING GOES WRONG.

WHAT WILL SELLER’S LAWYER BE CONCERNED WITH?

- ENSURING SELLER IS **NOT FINANCIALLY RESPONSIBLE** FOR MORE THAN EITHER:
  - AMOUNT PAID, OR
  - PRICE OF THE PRODUCT/ SERVICE/ EQUIPMENT AT ISSUE
WHAT DO THE FOLLOWING **BUYER** CLAUSES MEAN?

The rights and remedies reserved to Buyer in this Agreement will be cumulative with and in addition to all remedies available at law.

All rights and remedies of Buyer specifically set forth in this Agreement shall be in addition to any other further rights and remedies provided at law.

In addition to other remedies available at law, Buyer may terminate this Contract for Seller’s default.

In addition to other remedies available to Buyer, Buyer may return to Seller for full credit any goods which do not meet the warranties.

**NOTE:** These clauses “lurk” in many areas of the Contract.
WHAT DO YOU EXPECT SELLER’S LAWYER TO DO?

The rights and remedies reserved to Buyer in this Agreement will be cumulative with and in addition to all remedies available at law. **Seller’s maximum liability shall be limited to the price of the product.**

All rights and remedies of Buyer specifically set forth in this Agreement shall be in addition to any other further rights and remedies provided at law. **Seller’s maximum liability shall be limited to the price of the product.**

In addition to other remedies available at law, Buyer may terminate this Contract for Seller’s default. **Seller’s sole obligations and Buyer’s sole remedies are set forth herein. Seller’s maximum liability shall be limited to the price of the product.**

In addition to other remedies available to Buyer, Buyer may return to Seller for full credit any goods which do not meet the warranties. **Buyer’s sole remedy under this warranty shall be limited to repair, replacement or refund. In no event shall Seller’s liability exceed the price of the product.**
WHAT ARE THE MOST TYPICAL OUTCOMES?

CERTAIN % SUPPLIERS WILL SIGN WITH LITTLE/NO NEGOTIATION

THOSE WHO DON’T:

- OFTEN A FINAL STUMBLING BLOCK
- SOMETIMES, THE CONTRACT JUST ISN’T FINALIZED
  - PARTIES MOVE FORWARD WITH PERFORMANCE ANYWAY
  - OR DEAL DOESN’T GET DONE
- MANY TIMES, IT’S WHO “BLINKS” FIRST
  - THE CAP GOES UP OR DOWN BASED ON LEVERAGE; GETTING THE DEAL DONE

PROBLEM WITH THIS APPROACH:

- The UNDERLYING issues are not discussed in practical terms
- The lawyers usually drive resolution
Leveraged/ astute supplier will insist on some LOL

- Prudent Seller decide which risks willing to assume / not assume

Consider real world risks and what makes sense for transaction

- What do you want your REMEDIES to be?
- Use real world examples
- “Swap” damages: Those unlikely to pursue vs Those you expect to recover

Talk concepts before talking about language

- Avoid using “legal” jargon

BOTTOM LINE ISSUES:

- LOL = Identifying and Managing RISK
- Typical Approach: Protect against Bad Outcomes
  - Consider encouraging GOOD performance
Hadley v. Baxendale

Leading English Contract Law Case which

Set the guidelines to establish
Contract Damages
Consequential damages must be:

1. *SPECIAL TYPES OF DAMAGES reasonably foreseeable at the time of contracting*;

2. Proven with sufficient certainly; and

3. Unavoidable (injured party has the **duty to mitigate**)
WHAT IS: REASONABLY FORESEEABLE?

- A prudent person would be able to expect the ultimately harmful result of their actions.
- At time the parties entered into the contract, the breaching party had reason to know these special damages might occur if it breached.
IMPORTANT NOTE TO: CONSEQUENTIAL DAMAGES

Consequential Damages generally do not include damages for third party claims.

• **What is a THIRD-PARTY CLAIM?**
  Claim against your organization made by a 3rd party which was caused by your supplier.

  **EXCEPTION TO ABOVE:**

  • Claims by third parties for **bodily injury, death, property damages resulting from defective product WILL be** considered REASONABLY FORESEEABLE and THEREFORE, CONSEQUENTIAL DAMAGES UCC 2-715 (2)

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EXAMPLE OF A THIRD-PARTY CLAIM

• While on your site, contractor injures a UPS driver/vehicle;
• UPS driver sues your company;
• Jury determines your company was not liable;
• Judgment against contractor;
• Your company has incurred $750k attorneys fees/ court costs

QUESTION:
Do you have the legal right to demand the contractor reimburse you for those costs?
IMPORTANT REASON FOR INDEMNITY

ANSWER: NO!

WHY?

Without an Indemnity clause, Supplier is not obligated to reimburse your company for $$$ incurred from 3P claims.
“To Indemnify” means:
- To hold harmless,
- Protect from loss,
- To make reimbursement of a loss incurred

Indemnity allows the Buyer to recover all damages from the Seller even if:
- They are not reasonably foreseeable,
  and
- They include third party claims.
INDEMNITY

INDEMNITY expands Seller’s liability for damages available under contract law by transferring:

1. Risks to another *regardless of fault*
2. Responsibility for Third Party claims
3. Liability for judgment
4. The duty to defend, i.e. attorneys’ fees; court costs

And:

5. **NO requirement that damages be “foreseeable”**
TWO TYPES OF INDEMNITIES

1. **Third Party Claim Indemnity**
   Indemnifies for damages arising out of 3P claims

2. **Contractual / First Party Indemnity**
   Indemnifies for *any* damages arising out of the failure of a party to comply with the contract.
   **No need to show “foreseeability”**.

Frequently, an indemnity clause contains both
Examples of Third-Party Claims:

- Injuries/ death to persons
- Property damage
- Claims resulting from defective product/ poor services
- Intellectual Property infringement
- Data Loss (Customer; Student)
THIRD PARTY CLAIM INDEMNITY

Contracts requiring 3P claim Indemnity

- Construction
- Facility
  - Maintenance; Janitorial; Landscape
- Software & Technology
- Direct Material
- Equipment
  - Installation; Maintenance
- Professional Services
- Logistics
- Development

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THIRD PARTY CLAIM INDEMNITY CLAUSE

Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, agents and representatives from and against any and all third party claims, suits, losses, liabilities, penalties, damages (whether actual, consequential, punitive or otherwise) and associated costs and expenses, including attorney’s fees, expert fees, and costs (collectively “Claims”) that are caused in whole or in part by: (a) any breach by Supplier of this Agreement; (b) any negligent, or intentional act, error or omission by Supplier, its employees, officers, or agents in the performance of this Agreement; or (c) any alleged or actual infringement by the Products of any Intellectual property rights.
THIRD PARTY CLAIM INDEMNITY CLAUSE

Opening phrase of clause:

Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, agents and representatives from and against any and all third party claims, suits, losses, liabilities, penalties, damages (whether actual, consequential, punitive or otherwise) and associated costs and expenses, including attorney’s fees, expert fees, and costs (collectively “Claims”) ......

Note:

• Above is protection from “third party claims” which include claims for PI, death, property damage, IP infringement
Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, agents and representatives from and against any and all third party claims, suits, losses, liabilities, penalties, damages (whether actual, consequential, punitive or otherwise) and associated costs and expenses, including attorney’s fees, expert fees, and costs (collectively “Claims”) that are caused in whole or in part by: (a) any breach by Supplier of this Agreement; (b) any negligent, or intentional act, error or omission by Supplier, its employees, officers, or agents in the performance of this Agreement; or (c) any alleged or actual infringement by the Products of any Intellectual property rights.
THIRD PARTY CLAIM INDEMNITY

Supplier shall ... indemnify ....Buyer, against .....all third party claims, ..................caused in whole or in part by...

ASSUME:
- Supplier is 60% negligent and
- Buyer is 40% negligent........

QUESTION:
What would Supplier’s percentage responsibility be under the above clause?
THIRD PARTY CLAIM INDEMNITY

ANSWER:

Supplier would be 100% responsible for the damages

As a result of the language:

.......... “caused in whole or in part by...”
Many Buyer Indemnity clauses require that Seller indemnify Buyer for:

A. Damages caused by Seller  AND

B. Damages caused by the **Buyer** or **another party**
Typical SELLER PROBLEM with BUYER INDEMNITY Clauses

Can you see the problem the astute/leveraged supplier would have?
QUESTION:

How could you make the Supplier proportionally responsible for the damages it caused?
THIRD PARTY CLAIM INDEMNITY

ANSWER:

Add qualifying language in which Supplier assumes responsibility for its share of the damages

See next slide.....
THIRD PARTY CLAIM INDEMNITY

Approach to Resolution

Supplier shall ... indemnify ....Buyer against .....all third party claims, ............to the extent caused by:
Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, agents and representatives from and against any and all third party claims, suits, losses, liabilities, penalties, damages (whether actual, punitive, consequential or otherwise) and associated costs and expenses (including attorney's fees, expert's fees, and costs) arising from or relating to third party claims, demands or actions (collectively “Claims”) that are to the extent caused by: (a) any breach by Supplier of this Agreement; (b) any negligent, or intentional act, error or omission by Supplier, its employees, officers, or agents in the performance of this Agreement; or (c) any alleged or actual infringement by the Products of any Intellectual property rights.
Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, agents and representatives from and against any and all third party claims, suits, losses, liabilities, penalties, damages (whether actual, punitive, consequential or otherwise) and associated costs and expenses (including attorney's fees, expert's fees, and costs) arising from or relating to third party claims, demands or actions (collectively “Claims”) that are to the extent caused by: (a) any breach by Supplier of this Agreement; (b) any negligent, or intentional act, error or omission by Supplier, its employees, officers, or agents in the performance of this Agreement; or (c) any alleged or actual infringement by the Products of any Intellectual property rights.

QUESTION:
According to the above clause: If Supplier is 60% negligent and Buyer is 40% negligent, what is Supplier’s % responsibility?
THIRD PARTY CLAIM INDEMNITY

ANSWER:

Supplier responsibility is 60%
THIRD PARTY CLAIM INDEMNITY

Another example of the same issue:

Supplier shall protect, defend, hold harmless and **indemnify** Customer and its officers, directors, employees, agents and assigns, from and **against** any and **all third party claims**, suits, allegations, judgments, actions, liabilities, losses, damages, costs and expenses, including reasonable attorneys fees and court costs **in any way caused by** or arising from (i) a negligent or malicious act or omission of **Contractor**, (ii) any **defect in materials or workmanship**, or (iii) any **breach by Contractor** of this Agreement, **regardless of whether or not it is caused in whole or in part by Customer or any other party**.

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Suppliers shall protect, defend, hold harmless and indemnify Customer and its officers, directors, employees, agents and assigns, from and against any and all third party claims, suits, allegations, judgments, actions, liabilities, losses, damages, costs and expenses, including reasonable attorneys fees and court costs in any way caused by or arising from (i) a negligent or malicious act or omission of Contractor, (ii) any defect in materials or workmanship, or (iii) any breach by Contractor of this Agreement, regardless of whether or not it is caused in whole or in part by Customer or any other party.

QUESTION:

What is Supplier’s percentage of responsibility under this clause?
THIRD PARTY CLAIM INDEMNITY

ANSWER:

100%

How might you resolve this issue?

See next slide
**THIRD PARTY CLAIM INDEMNITY**

Supplier shall protect, defend, hold harmless and *indemnify* Customer and its officers, directors, employees, agents and assigns, from and *against* any and *all third party claims*, suits, allegations, judgments, actions, liabilities, losses, damages, costs and expenses, including reasonable attorneys fees and court costs *in any way to the extent caused by* or arising from (i) a negligent or malicious act or omission of Contractor, (ii) any *defect in materials or workmanship*, or (iii) *any breach by Contractor* of this Agreement, regardless of whether or not it is caused in whole or in part by Customer or any other party.
Contractual Indemnity requires Seller be liable for:

- Third-Party claims; AND

- All claims for damages **Buyer** incurs even if:
  - The damages were *not reasonably foreseeable*; or
  - Buyer failed to mitigate; or
  - Seller was only partially at fault

THE ABOVE EXPANDS SELLER’S LIABILITY BEYOND CONTRACT DAMAGES (which require foreseeability & Seller fault)
Example
Contractual Indemnity

**Seller agrees to** defend, **indemnify** and hold **Buyer**, its directors, officers, employees, and agents, harmless from and **against** any and **all claims, damages**, losses, liabilities, demands, suits, judgments, causes of action, legal proceedings, penalties or other sanctions, and any and all costs and expenses arising in connection therewith, including attorney’s fees, expert fees, and all court costs and expenses **which may, directly or indirectly, in any way result from** or arise out of or be in relation to: (i) **the Products or Services**; (ii) **the negligence or willful misconduct of Seller**, or any of its employees or anyone else for whom it is responsible; and (iii) **any breach by Seller**, or by any of its employees or anyone else for whom it is responsible, of any provisions of this Agreement.
Example
Contractual Indemnity

Opening Phrase.....

Seller agrees to defend, indemnify and hold Buyer, its directors, officers, employees, and agents, harmless from and against any and ALL claims, damages, losses, liabilities, demands, suits, judgments, causes of action, legal proceedings, penalties or other sanctions, and any and all costs and expenses arising in connection therewith, .......

QUESTION:

How is this different from Third Party Claim Indemnity?
Contractual/ First Party Indemnity

ANSWER:

“All claims” require Seller be liable not only for:

◦ Third-Party claims;

BUT ALSO FOR:

◦ All claims for damages that **Buyer** (first Party) **incurs** whether or not:
  ◦ The damages were *reasonably foreseeable*; or
  ◦ Buyer failed to mitigate
  ◦ And...in an unlimited amount
Example
Contractual/ First Party Indemnity

Now….look at the rest of the indemnity clause:

**Seller agrees to** defend, **indemnify** and hold **Buyer**, ..... **against** any and **all claims, damages**, .......**which may, directly or indirectly, in any way result from** or arise out of or be in relation to: (i) **the Products or Services**; (ii) **the negligence or willful misconduct of Seller**, or any of its employees or anyone else for whom it is responsible; and (iii) **any breach by Seller**, or by any of its employees or anyone else for whom it is responsible, of any provisions of this Agreement.

**QUESTION:**

What other issues would Supplier have?
Contractual/ First Party Indemnity

This clause also makes Seller responsible for:

1. BUYER Claims/ DAMAGES in an unlimited amount even if not reasonably foreseeable

2. Damages caused not only by Seller but by Buyer or any other third party;
PROBLEM FOR SELLERS

Many Buyer Indemnity clauses make Seller responsible for:

1. Third Party Claim Indemnity; and

2. Damages caused not only by Seller but by Buyer or any other party; and

3. Damages incurred by Buyer which go beyond Contract Damages (requiring “foreseeability”); and

4. Damages incurred by Buyer in an unlimited amount for Seller’s breach
PROBLEM FOR SELLERS

Seller agrees to indemnify Buyer against all claims damages which may, directly or indirectly, arise out of (i) the Products or Services; (ii) the negligence of Seller; and (iii) any breach by Seller.

What is Seller responsible for under this clause?

1. Claims/damages incurred by 3rd parties ("all claims");
2. Claims/damages incurred by Buyer ("all claims");
3. Damages which go beyond contract damages ("all damages");
4. Claims for damages caused by someone other than seller ("claims which may...indirectly...arise out of"); and
5. Unlimited damages
APPROACHES TO RESOLUTION

1. Seller responsible to indemnify only for 3P claims;

2. Seller not responsible for damages incurred by Buyer which go beyond “reasonably foreseeable” contract damages; and

3. Seller is responsible for damages caused by Seller only (not by anyone else)
MAJOR PURPOSE OF INDEMNITY

• A major purpose of Indemnity is to protect Buyer from claims by third parties caused by Seller
  o Third Party Claim Indemnity

• However......many Buyer Indemnity clauses also contain Contractual/ First Party Claim Indemnity
  o Obligating Seller to reimburse not only for Third Party claims, but unlimited $$ to Buyer in addition to breach of contract damages

Seller’s Problem: Many Buyer Indemnity clauses make the Seller responsible not only for what Seller does, but for what anyone else does!
**APPROACH TO RESOLUTION**

Seller agrees to **defend**, **indemnify** and hold **Buyer**, its ..........., harmless from and **against** any and **all claims, damages**, ...........and any and all costs and expenses arising in connection therewith, ...............which may, directly or indirectly, in any way result from or arise out of or be in relation to **arising in connection with third party claims to the extent caused by**: (i) the Products or Services; (ii) the negligence or willful **misconduct of Seller**, ........; and (iii) **any breach by Seller**, or ...........of any provisions of this Agreement.
APPROACH TO RESOLUTION

UNREALISTIC:

- To expect a *leveraged* Supplier to agree to Contractual Indemnity
  - (Often not insurable)

REALISTIC:

- Third Party Claim Indemnity
  AND
- Supplier responsibility *to the extent* it caused the damages
  - (Often insurable)
THE ROLE OF INSURANCE

- Insurance covers damages for:
  - Bodily Injury
  - Death
  - Property Damage
  - Defective Product (which causes damages above)
  - Claims of IP Infringement
  - Cyber Liability

  Note: The above are Third Party claims

- Insurance often does not cover economic damages from:
  - Late delivery
  - Defective product
  - Downtime
  - Loss of ability to provide services to your customers
  - Overtime
  - Loss of profits/ business

  Note: The above are First Party/ Buyer claims

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INDEMNITY AND INSURANCE

• Require that your Supplier maintain insurance
  ➢ This ensures the Supplier will have $$ to stand behind their indemnity

• Discuss minimum types of coverage and dollar requirements with your risk management department

• Work with risk management to understand what is/ is not covered by insurance

• Your company should be named as an additional insured

• Require your Supplier show proof of insurance and the “additional insured” endorsement
PUTTING IT ALL TOGETHER: Relationship between Indemnity & LOL

Limitation of Liabilities clause:
Neither party shall be liable to the other for any incidental, consequential, incidental, or special damages (including lost profits and lost business), arising out of or related to this agreement. In no event shall either party’s liability exceed the purchase price of the Product.

Indemnity clause:
Supplier shall defend, indemnify and hold harmless Buyer, its officers, directors, and agents from and against any and all losses, liabilities, claims, suits and damages (whether actual, punitive, consequential or otherwise) and associated costs and expenses (including attorney’s fees, expert’s fees, and costs of investigation) to the extent caused by: (a) any breach by Supplier of this Agreement or (b) any negligent, or intentional act, error or omission by Supplier, its employees, officers, or agents in the performance of this Agreement.
QUESTION:
Do you see an “unintended consequence/ cap” to the Indemnity clause?
Relationship between Indemnity and LOL

ANSWER:

The LOL contains a monetary cap that applies to the entire contract

That means:

- The cap in the LOL will apply to the indemnity clause

Do you really want to limit the $$ on the INDEMNITY?
CONSIDER the contractual relationship between Indemnity and Limitation of Liabilities

If you’ve agreed to a Limitation of Liabilities clause, you don’t necessarily want that limitation to apply to the Indemnity clause.

➢ Make sure you carve out the indemnity obligations from the LOL.
Examples of CARVE OUT language:

The limitation of liability contained in this section shall not apply to Seller’s indemnification obligations under this Agreement.

***********

Notwithstanding any other provision of this Agreement, there shall be no limitation on Seller’s obligation to indemnify Buyer as set forth in this Agreement.
PRAGMATIC APPROACHES TO RESOLUTION

- LIMITATIONS OF LIABILITY and INDEMNITY involve:
  Identifying and Managing RISKS
  Bring real world experience to these issues

- It’s unrealistic to expect the astute supplier to be responsible for ALL RISKS in an UNLIMITED amount

- The leveraged Supplier will ask for a CAP on DAMAGES
PRAGMATIC APPROACHES TO RESOLUTION

- Understand why you’re talking about liabilities
  - Talk in specific terms: Discuss “worst case scenarios”
  - What’s a stake?
  - NOTE: You will have more specific information about the supplier/products/services than your lawyer

- How much exposure is reasonable for supplier to accept?
  - Which risks are you better able to manage, mitigate or avoid?
  - Is it realistic to expect the supplier assume the risk?

- Are you each taking your fair share of risk when you look at the entire circumstances?
PRAGMATIC APPROACHES TO RESOLUTION

• Can you resolve the issue if damages are ONLY TO THE EXTENT CAUSED BY SELLER?

• Consider INSURANCE
  • Does Seller’s insurance cover? Can they purchase it?
    • They will pass costs to you.
  • Does Buyer’s insurance cover? Will it be less expensive if you cover?

• What’s the effort involved?
  ◦ I have 50 of these contracts I have to get through by Friday
  ◦ I don’t want to go back to legal
WORKING WITH YOUR LAWYER

- DISCUSS THESE ISSUES WITH YOUR LAWYER
  - Provide specifics and real world examples

- DON’T BE RELUCTANT TO “ADVISE” YOUR LAWYER
  - You’ve got the “hands on” experience that’s important for us to know

- LAWYER’S JOB IS NOT TO TELL YOU WHAT TO DO
  - OUR JOB IS TO ADVISE YOU OF THE RISKS

HOWEVER:
- Legal has become very powerful
- We don’t generally do a good job of explaining the issues
- The CYA Factor
FINAL THOUGHTS

Limitations of Liability and Indemnity

REMEMBER:

Both clauses boil down to

Who is going to pay the $$$ for what?

They are NOT SIMPLY “LEGAL” CLAUSES

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QUESTIONS?

Ink the Deal
Contracting seminars for purchasing and sales professionals

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