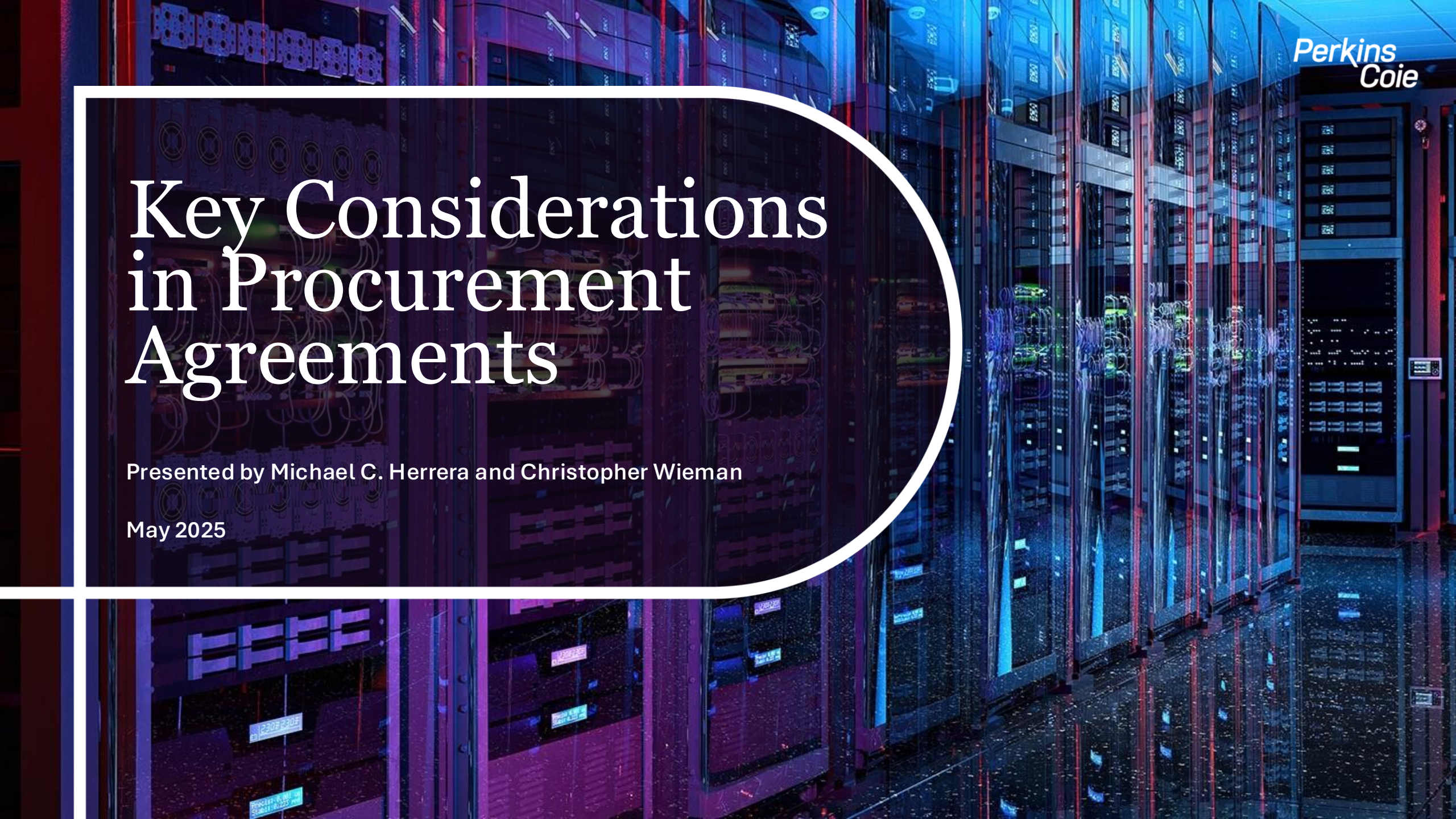

Key Considerations in Procurement Agreements

Presented by Michael C. Herrera and Christopher Wieman

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Michael Herrera is Counsel in the Technology Transactions & Privacy group at Perkins Coie. His experience includes structuring strategic alliances, collaborations, patent and trade secret licenses, and services delivery arrangements, design, development, non-recurring engineering, contract manufacturing, fabrication, testing, assembly, distribution, and other supply chain-related relationships. Michael manages a team of attorneys responsible for over $200bn in annual spend for datacenter hardware, equipment, and services procurement across multiple hyperscaler clients. Michael work also spans a wide variety of high-technology sectors, including semiconductor, newspace, quantum computing, as well as the chemical and material sciences industries.

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Christopher Wieman represents some of the world's leading technology enterprises in AI product development, licensing, and commercialization arrangements, including for robotics and automation industries, Energy and Renewable providers, as well as cloud computing and infrastructure providers. He drafts and negotiates agreements covering data center procurement, Energy supply and Renewable Energy Certificates, model co-development collaborations, inbound and outbound model licensing, and AI-centric product integrations. Additionally, Chris represents providers and buyers of web-based products and services in software-as-a-service (SaaS), IaaS, and PaaS transactions. He assists companies in negotiating and structuring complex services and outsourcing arrangements.

Overview

- Current Trends in Datacenter Procurement
- Understanding Your Client's Leverage
- Commercial Flexibility: Forecasts, Purchase Orders & Pricing
- Delivery & Supply Chain Risk
- Warranties, Indemnities & Liability
- Ownership of Designs, Customizations, Software, and Integration Risk
- Compliance, ESG, and Trade Risk in Procurement Contracts

Current Trends in Datacenter Procurement

What's Being Procured?

- Compute hardware
- Infrastructure
- Network gear
- Equipment-related services

Market Forces Driving Change

- Cloud service expansion = hyperscaler growth
- AI workloads require specialized infrastructure
- Supply chain instability

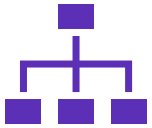
Key Procurement Trends

- Custom vs. Off-the-Shelf
- Prepayments & NRE
- Allocation rights
- Environmental & ESG clauses

Why this context matters

Procurement contracts represent complex ongoing relationships, not just price and quantity

Understanding risk allocation is critical to effectively structure and negotiate agreements



As a **Buyer**: operational risk impacts business continuity

As a **Supplier**: delivery risk creates cost exposure

Key Question: How can we structure contracts to mitigate some of these risks?

Understanding Your Client's Leverage

- Who is your client **in the market**?
- What **size** is your client relative to the counterparty?
- What **type** of product is being procured?
- How **critical** is this engagement?
- What are the **operational deadlines**?
- What is the **risk of non-performance**?
- Ask your client early:
  - *What terms are the most important to us?*
  - *What are our best and final fallback positions?*

Practice Tip:

The best terms in the world don’t matter if your client has no leverage to enforce them.

Match the contract strategy to the business reality.

Commercial Flexibility

Commercial Flexibility: Forecasts

- Critical for suppliers to **plan production and allocate capacity**
- Binding vs. non-binding forecasts

Buyer Priorities	Seller Priorities
Flexibility	***Predictability***
Non-binding forecasts	Binding forecasts
Flexibility to adjust downward or cancel	Limitation on changes
Option to increase demand above forecast (upside flexibility)	Predictable volume to reduce risk

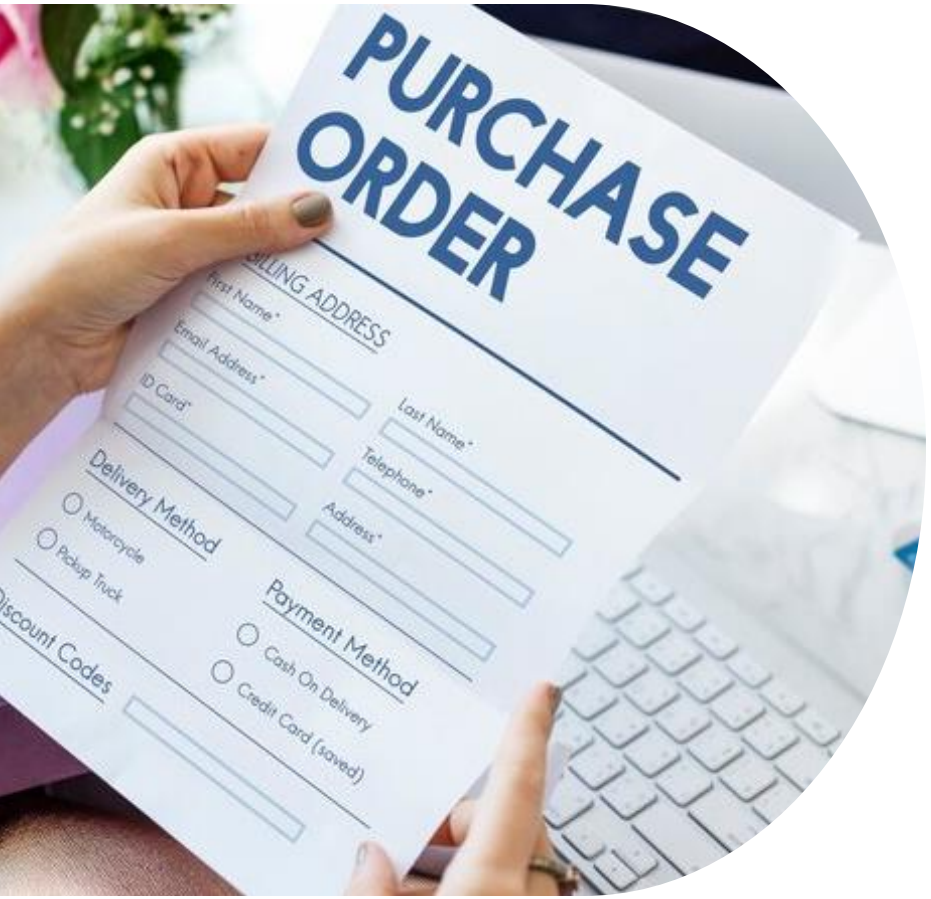
Practice Tip:

Be careful with requirements contracts.

While they create quasi-binding forecasts, ***a buyer can still get out of purchasing the forecasted amount*** if it acted in good faith and let suppliers know when needs change (UCC §2-306(1)

See Dienes Corp. v. Long Island R.R. (S.D.N.Y. 2002) (buyer ordered only a tiny fraction of the forecasted replacement parts but prevailed because the reduced demand was due to legitimate business reasons (fewer failures than expected), thus not a breach of UCC §2-306's good faith requirement)

Commercial Flexibility: Purchase Orders (PO)



- **Issuance** and **acceptance** process
- **Creditworthiness** concerns

Buyer Priorities	Seller Priorities
Predictability and Upside Flexibility	***Flexibility***
PO accepted by default (esp. if within forecast)	Right to review and reject POs
Flexibility to submit POs beyond forecast	Limit on over-forecast orders
No arbitrary rejection of urgent POs	Avoid operational overload

Practice Tip:

POs should set forth ***specific quantities*** to be enforceable against the supplier.

(UCC §2-201)

See MSSC, Inc. v. Airboss (Mich. 2023) (A "blanket" PO with only estimated annual volumes (no fixed qty or exclusivity) failed to satisfy the Statute of Frauds' quantity requirement and was found unenforceable beyond individual releases – i.e. supplier has discretion to fulfill the PO, despite its prior acceptance.)

Commercial Flexibility: Price Adjustments

- Rights to **adjust price** (upwards or downwards)
- Adjustment **guardrails**

Buyer Priorities	Seller Priorities
Flexibility	***Predictability***
Price stability and budget control	Right to increase prices due to rising material, labor, or FX costs
Mutual agreement on price changes	Avoid pricing lock-ins that squeeze margins
Price reductions if input costs drop	Ability to reflect market volatility

Practice Tip:

If agreeing to price flexibility, consider tying adjustments to ***objective cost drivers*** (e.g., metal index, FX rates), not discretion or approval. This avoids surprises and preserves trust.

However, be careful of ***too much inflexibility in pricing***, to account for unexpected circumstances.

See BAE Indus. v. Agrati (E.D. Mich. 2022) (where a supplier under a fixed-price requirements contract tried to halt shipments unless the buyer agreed to a price increase, citing steel cost surges and commercial impracticability. The court required supplier to continue deliveries at contract price)

Delivery & Supply Chain

Delivery and Supply Chain Risk

Delivery Commitments

- "**Incoterms**" = standardized international shipping terms defining when risk and responsibility transfer between parties (e.g., EXW, DDP, DAP)
- "**Title**" = legal ownership. "**Risk of loss**" = who bears responsibility for damage/loss in transit.
  - Title passes as the parties agree (UCC §2-401)
  - Risk of loss can remain with the supplier for rejected goods (UCC §2-510)

Late Delivery Remedies

- Contractual consequences for delayed shipments, including liquidated damages (LDs), service credits, or termination rights.
- Remember, time must be “of the essence” if you want additional rights.
- Be careful with LDs!
- Opportunity to cure is often reasonable.

Order Changes / Cancellation

- Buyer’s want the ability to adjust order quantities or delivery dates, or cancel altogether
- Suppliers want to avoid stranded inventory on their books
- OTS vs. Custom Products?

Delivery and Supply Chain Risk Cont'd.

As not all supply chain disruptions are not captured by Force Majeure under law *(see Isuzu North America v. Progressive Metal (E.D. Mich. 2021)*, consider employing tactics that **help ensure continuity of supply** and **minimize the disruptions.**

Tactics to Ensure Continuity of Supply:

Buffer Inventory: Reserved stock of products held by the supplier or customer to mitigate the impact of supply delays or demand spikes.

EOL Process: Obligations for supplier to provide formal "End of Life" notifications to notify buyer in advance that a product will be discontinued.

Tactics to Minimize Supply Chain Disruptions:

Disaster Plans / Business Resumption Plans (BRPs): Supplier-prepared recovery protocols describing their procedures for responding to and recovering from business interruptions.

Priority Allocation: Allocation clauses determine who gets product when supply is constrained (e.g., chip shortages, logistics blockages). See UCC §2-615.

Warranties, Indemnities, and Liability

Warranties, Indemnities, and Liability: Quality-Related Warranties

Quality-Related Warranties

Typical Scope:

- Conform to written specifications
- Free from defects in material and workmanship
- Usually tied to a specified warranty period
  (e.g., 12–36 months from delivery or acceptance)
- Reasonable carveouts for misuse or abuse

Typical Remedies:

- Repair or replacement of defective units
- Refund of purchase price *(rare; typically fallback remedy)*
- Warranty resets for repaired/replaced goods *(buyer-favorable)*

Practice Tip:

Include a ***clear RMA process***, and specify whether the remedies include ***repairs, replacements, or refunds***.

Carefully consider the role of ***disclaimers***.

See City of New York v. Bell Helicopter (E.D.N.Y. 2015) (finding that, where a warranty is effectively disclaimed, a buyer might be left without recourse even for catastrophic failures)

Warranties, Indemnities, and Liability: Non-Quality Warranties

Non-Quality Warranties

Typical Scope:

- Product does not infringe third-party IPR (UCC §2-312(3))
- Product complies with applicable laws, regulations, and standards
- Product is free of liens, encumbrances, malware, or export restrictions
- Necessary licenses for software or embedded tools are valid and in place
- Indefinite (not tied to warranty period)

Typical Remedies:

- Replacement of infringing/non-compliant product
- Reimbursement for third-party enforcement actions or claims
- Contract rescission or right to terminate for breach
- Often paired with indemnification, but warranty may stand on its own for non-monetary remedies

Warranties, Indemnities, and Liability: Epidemic Failure

Typical Scope:

- Defined threshold (e.g., 5–10% of delivered units affected)
- Applies regardless of whether defects occur within warranty period
- May extend to units that have not yet failed but are reasonably expected to

Typical Remedies:

- Broad replacement obligation for all affected units
- Reimbursement of associated logistics, labor, or retrofit costs
- May trigger enhanced support or inspection rights

Warranties, Indemnities, and Liability: Indemnification

In General:

- Indemnity provisions shift responsibility for third-party claims from one party to the other.
- In procurement deals, typically only supplier has an obligation to indemnify
- Distinct from warranty:
  - *Indemnity = coverage of third-party claims*
  - *Warranty = promises between the parties*

Typical Scope:

- Product infringes third-party IPR
- Product causes personal injury / property damage
- Product warranty remedies / epidemic failures
- Compliance Breaches

Typical Remedies:

- Indemnifying party obligation to defend
- Indemnified party right to control defense
- Reimbursement for:
  - *liabilities/judgments resulting from the claim*
  - *related costs and expenses (e.g., legal costs)*
- Replacement or modification of infringing product (IPR)

Practice Tip:

IP indemnity is often viewed as non-negotiable by sophisticated customers.

If there is strong resistance, ***consider creative carve-outs that apportions risk based on who is best suited to control the risk***.

But, whatever you do, ***be clear***!

Warranties, Indemnities & Liability: Limitations of Liability

In General

- Clauses that cap the monetary liability of one or both parties under the agreement, typically including:
  - a **disclaimer of damages**, which bars certain categories of recovery (e.g., no indirect, consequential, or incidental damages); and
  - a **liability** or **damages cap**, which acts as a ceiling on a party's monetary responsibility for breach, obligations to remedy and indemnity, etc.

Common Carveouts (Exclusions from Cap or Disclaimer)

- Breaches of confidentiality
- Warranty remedies
- Indemnity obligations
- Personal injury or death
- Negligence; willful misconduct; fraud

Practice Tip:

Use carveouts ***strategically***—don't just copy and paste a long list.

Tie them to the ***real risks your client can't insure against***, like third-party IP infringement claims, or mission-critical infrastructure failures.

Ownership of Designs, Customizations, Software, and Integration Risk

Ownership of Designs, Customizations, Software, and Integration Risk

Ownership of Designs and Customizations	• **Common approach:**
	  – Buyer owns customizations they specifically paid for (e.g., unique thermal solution, chassis design)
	  – Supplier retains ownership of core product designs, even if modified
	• **Embedded or bundled software licenses** (e.g., controller firmware, network switch OS)

Key Issues	• Is the license broad enough for the buyer's intended use (e.g., operation, integration with monitoring tools, resale)? • Are updates and support included, and for how long? • Is there any open source or third-party software that requires source code disclosure or otherwise creates a security, license, or audit risk?
Integration Risk – Buyer and Supplier IP Collisions	• Typically appears in custom rack systems, thermal platforms, and control interfaces • Buyer wants to ensure supplier doesn't claim ownership over jointly developed integrations. • Supplier wants protection from being accused of misusing buyer IP embedded in specs or system architecture.

Compliance, ESG, and Trade Risk

Compliance, ESG, and Trade Risk
Compliance with Buyer Policies

- **Typical contract terms**:
  - Flow-down of buyer's policies via URL or incorporated attachment
  - Termination right for material breach of policy obligations
- **Key considerations**:
  - Which policies actually apply to this transaction? Avoid overly broad adoption of unrelated standards
  - Review notification processes for changes to policy, and whether seller has any objection rights
  - Watch for audit and reporting rights that impose operational burdens
  - Clarify if compliance is a continuing obligation or point-in-time certification

Compliance, ESG, and Trade Risk
Environmental, Social, and Governance

- **Typical contract terms:**
  - Use of recyclable or non-toxic materials
  - No conflict minerals or forced labor in the supply chain
  - Certifications for ISO 14001, RoHS, REACH compliance.
  - Power efficiency and emissions targets for data center hardware.
- **Key Considerations:**
  - Confirm feasibility of compliance with supplier operations (especially for SMBs or offshore vendors)
  - Avoid absolute compliance clauses—use “to the extent applicable” or “commercially reasonable efforts.”
  - Address remedies for failure—e.g., cure period vs. termination vs. indemnity

Compliance, ESG, and Trade Risk
Trade Compliance and Export Controls

- **Contract terms to watch:**
  - Supplier must provide ECCNs, HTS codes, and COO documentation.
  - Representations that product is not restricted under EAR/ITAR or local laws.
  - Clauses covering changes in law (e.g., new tariffs or embargoes).
- **Key Considerations:**
  - Build in cooperation clauses for regulatory inquiries.
  - Tie any indemnity or cost burden to the party controlling the classification.
  - Consider limitations of liability for unexpected tariff or customs changes.

Thank you!
Questions?

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